United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLA[illegible]728

See 355 F.2d 710, 732

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

47 ~~Ct. App. D.~~ 9

408 F.2d 365

See Gilbert — cert. in Sup.

No. 19,846

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no lineup

no lawyer

MALCUS T. CLEMONS,

Appellant,

v.

UNITED STATES OF AMERICA

Appeal from the United States District Court

for the District of Columbia

339
599.

DAVID E. FELLER
1001 Connecticut Ave., N. W.
Washington, D. C. 20036

Attorney for Appellant
(Appointed by this Court)

See p. 96-8 Gov't

QUESTIONS PRESENTED

In the opinion of the appellant the following questions are presented:

1. Whether the Government may properly (a) hold a prisoner on one charge and grant him a preliminary hearing on that charge, (b) procure his indictment, while imprisoned, on an unrelated charge without preliminary hearing, (c) dismiss the first charge, (d) obtain for itself the advantage of a preliminary hearing by exhibiting the accused to the Government's witnesses in the courthouse cell block, and then (e) proceed to trial on the second charge.

2. Whether there was sufficient other prejudice to the accused because of the absence of a preliminary hearing to warrant the reversal of his conviction.

3. Whether the denial to the accused of the right to have counsel present when he is exhibited to the Government's witnesses in the courthouse cell block prior to trial constitutes an unconstitutional denial of the right to counsel.

4. Whether it was proper to admit the testimony of identifying witnesses to whom the accused had been exhibited, without a lineup, in the cell block prior to the trial.

5. Whether an accused, in a trial which depends solely upon his identification by the prosecution's witnesses, may introduce testimony that he was falsely identified in connection with another case at substantially the same time as he was identified by the Government's witnesses.

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JURISDICTIONAL STATEMENT

On October 18, 1965, appellant was convicted by a jury in the United States District Court for the District of Columbia on eight counts of robbery and assault with a dangerous weapon in violation of 22 D.C. Code §§ 2901 and 502. On November 12, 1965, he was sentenced to imprisonment from 4 to 12 years. On December 14, he was granted leave to appeal in forma pauperis and an order was entered directing that the transcript of the trial proceedings be prepared at the expense of the United States. This Court, on February 10, 1966, appointed the undersigned to represent appellant, directed the Clerk of the District Court to transmit the transcript, when prepared, as a supplemental record on appeal and ordered that appellant's brief be filed 25 days after the transcript was so filed.

Preparation of the transcript was delayed because of the absence of the reporter from the city. The transcript was ultimately filed and transmitted to this Court on April 6, 1966.

This Court has jurisdiction on appeal pursuant to Section 1291 of the Judicial Code, 28 U.S.C. § 1291, 62 Stat. 929.

STATEMENT OF THE CASE

On January 18, 1965, at approximately 4:00 A.M., a D. C. Transit bus was robbed. At 8th and D, N.E., two men got on the bus. After one of them received change for a dollar, both drew guns. One of the men (unidentified) pointed his gun at the driver, told him not to move the bus and demanded his money and the change carrier. The second man (later alleged to be appellant) went through the bus demanding at gun-point that the passengers hand over their money. Both men then left. After they got off, and while the front door was still open, the second man--who had taken the passengers' money--told the driver to get the bus out of there real fast or he would put a bullet through his head.

The driver drove the bus immediately to the Ninth Precinct police station, at 9th and E, Northeast, and reported the incident. The robbery squad was called and detectives interviewed the driver and the passengers. Five pictures were shown to the only white passenger and he selected one showing the appellant as being a picture of the second of the two men who had robbed the bus. Two other passengers were then shown this picture and agreed. No warrant for defendant's arrest was issued.

On February 4, the police responded to a call complaining about a drunk. They picked up Appellant and charged him with a wholly unrelated robbery from a man named DeMarco which took place on December 30, 1964. The file in that case (U.S.D.C. Grand Jury No. 239-65) shows that the Appellant was presented that day to a United States Commissioner, informed of his right to a preliminary hearing, of his right to counsel, and of his right to cross-examine witnesses. The Appellant requested a continuance until February 11, at which time a preliminary hearing was held. At the hearing, DeMarco described the robbery and identified Appellant as the robber. The Appellant was held to answer in the United States District Court and bond was set at $10,000. On defendant's motion to reduce bond the Government responded by stating, without proof, that the defendant had been identified in four additional robberies.[1/] The motion was denied. (The record of the proceedings in the DeMarco case is annexed hereto as Appendix A.)

1/ Cf. Transcript, p. 391. During the course of the trial in this case defense counsel sought to show the weakness of the identification of the appellant by proving that in one of the other robberies the defendant had been positively identified even though, at the time of the offense, he was in jail on a drunk charge. The District Court excluded the testimony after the United States Attorney asserted that the only other robbery the defendant had been charged with was the DeMarco robbery.

No hearing was held, and no charges had been filed at the time of the DeMarco hearing against Appellant in connection with the January 18 robbery of the D.C. Transit bus. But, it was subsequently developed at the trial of this case (T. 136, 145), the police brought the bus driver, a Mr. Darby, to the hearing and he identified the Appellant to a police officer as the second man involved in the January 18 robbery. The Appellant, of course, was unaware of Mr. Darby's presence and had no opportunity to cross-examine him.

On March 8, 1965, the defendant was indicted in the present case. Counsel was appointed for him and he was arraigned on March 12, 1965. He pleaded not guilty and the case was set for trial on April 12. No preliminary hearing was ever held.

Because no preliminary hearing in the present case had ever been held, the defendant had never been confronted with, or had an opportunity to observe or cross-examine, any of the witnesses who would identify him at the trial. He was, therefore, under some disability. It was, however, a shared disability. For the very same reason, the Government's witnesses (except for Darby) did not have an opportunity to see the defendant in the flesh and

confirm their identification by photograph.

The Government's problem was, however, easily solved. On the day first set for trial, April 12,[2/] the defendant was being held in the cell block in the courthouse. At 9:45 A.M., the United States Attorney, without notice to defendant's counsel and in his absence, brought some of his witnesses down to the cell block and had the defendant exhibited to them. Nothing was said to Appellant or by him. He was simply brought out to be exhibited to the Government's witnesses, who let the United States Attorney know whether they could or could not identify him as one of the robbers of the D. C. Transit bus.

This substitute for a preliminary hearing was apparently satisfactory to the Government. For, although the case was not tried that day--and did not in fact come to trial until October because counsel's motion for a mental examination was granted--the United States Attorney on that

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2/ The date stated in the record here in April 11 rather than April 12. April 11, 1965, however, was a Sunday and it is assumed that counsel erred by one day in stating the date. This is confirmed by an inspection by the undersigned of the record of visitors kept at the cell block. This shows that D. Smith, the Assistant United States Attorney who tried this case, and two others came to the cell block at 9:30 A.M. on April 12, 1965 to "Look at M. Clemons." Since three witnesses testified at the trial that they saw Clemons in the cell block in April (T. 57, 94, 116) it is assumed that they did not all sign the register.

same day, April 12, moved to dismiss the charge against defendant in the DeMarco case and he was therefore "released" on that charge. He, of course, remained in jail under the present indictment.

After other proceedings not here relevant, counsel who had represented appellant earlier was relieved of his assignment and new counsel was assigned. The case was set for trial on October 4, 1966. Counsel for defendant was present at 9:30 A.M. on that day but the United States Attorney asked that the case be placed at the foot of the calendar, so that trial would not begin until the next day, because of the absence of some of its witnesses. When this was done, counsel for defendant returned to his office. Immediately the United States Attorney utilized the opportunity to take one of the witnesses who had not been treated to the April "viewing" downstairs to the cell block to inspect the defendant. 3/

The trial began on the next day, October 5. Before testimony was offered, counsel for defendant moved to

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3/ The register at the cell block shows only that "D. Smith" was there at 10:30 A.M. No prisoner's name is shown. Assistant United States Attorney Smith agreed at the trial that this was done and the witness testified that he had been asked to identify the Appellant for the first time at the cell block on October 4. (T. 47).

dismiss the indictment because of these "viewings" of the defendant in the absence of his counsel. (T. 29-31). The motion was denied. (T. 34). He also moved that the testimony of the witnesses who had been given the previews be excluded. This motion was also denied. (T. 34).[4/]

The Government's case in chief depended solely and exclusively upon the identification by the driver and the passengers of the defendant as one of the two robbers. Five passengers testified at the trial. Of these, three had been invited to the April "viewing" (T. 58, 94, 117). They positively identified the defendant at the trial. One did not see the defendant until the October "viewing" (T. 47) and the last apparently was given no opportunity to see the defendant until trial. The latter two were not able to identify the defendant. The driver of the bus, who had been given his pre-trial crack at the defendant by bringing him in to watch the defendant at the February 11 preliminary hearing on the DeMarco complaint, identified the defendant.

The defendant took the stand, denied having committed the robbery, and said that he was in his room with a man

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4/ The motions were renewed and again denied after the first two witnesses, one April viewer and one October viewer, had testified. (T. 63-65).

named Harrell and a girl at the time it took place. Harrell confirmed the testimony. The defendant sought to discredit his identification by the Government's witnesses in two ways. First, he proved that he had been hospitalized with an infection of his right hand about two weeks prior to the robbery and he testified that the hand was still bandaged at the time of the robbery--although none of the passengers who testified that his hand was thrust in their faces with a gun had noticed either a bandage or a wound. Second, he attempted to show the weakness of the identification by what had happened in connection with another one of the robberies in which the Government, on February 11, had said he had been identified.

Since the trial court refused to permit this second point to be made to the jury, it should be stated in full. The facts, as developed outside the hearing of the jury, were as follows. On November 29, 1964, a cab driver named Brown was robbed. He identified Clemons to the police as one of the robbers. (T. 381). He was subpoenaed by the defendant in this case, without being given any information as to what testimony he was going to be asked to give. (T. 379). When called to the stand he described the robbery and positively identified the defendant as one of

the men involved. It was then disclosed to him--and proved--that defendant was in jail at the time serving a 30-day sentence for intoxication. When confronted with this fact, Brown still insisted Appellant was one of the robbers on November 29 "unless he have a twin brother."

The Government objected to this testimony on the ground that the Brown robbery was unrelated to the present case. The trial court sustained the objection, apparently on the ground that the police in the Brown case did not act on the identification, and had found Clemons to be innocent. The testimony therefore was taken out of the presence of the jury. (T. 391-A-395).

In rebuttal, the Government produced a witness the defense had been unable to find--the woman whom the defendant and Barrell had testified was with them when the robbery took place. She testified that she had not been with them on that date--although she had been, at approximately the same hour in the morning, approximately one week later.

The jury returned a verdict of guilty.

STATUTES AND RULES INVOLVED

Rule 5 of the Federal Rules of Criminal Procedure provides in pertinent part as follows:

> "(b) Statement by the Commissioner. The commissioner shall inform the defendant of the complaint against him, of his right to retain counsel and of his right to have a preliminary examination. He shall also inform the defendant that he is not required to make a statement and that any statement made by him may be used against him. The Commissioner shall allow the defendant reasonable time and opportunity to consult counsel and shall admit the defendant to bail as provided in these rules."

> "(c) Preliminary Examination. The defendant shall not be called upon to plead. If the defendant waives preliminary examination, the commissioner shall forthwith hold him to answer in the district court. If the defendant does not waive examination, the commissioner shall hear the evidence within a reasonable time. The defendant may cross-examine witnesses against him and may introduce evidence in his own behalf. ..."

STATEMENT OF POINTS

The conviction should be reversed because of:

I. The absence of a preliminary hearing under the circumstances of this case, i.e.:

(a) the Government manipulated two unrelated charges against the appellant so that it could give him a hearing on one and try him on the other;

(b) the record discloses that the appellant was gravely prejudiced by the absence of a preliminary hearing.

II. The deliberate failure to notify counsel for appellant and permit him to be present when the United States Attorney exhibited appellant, prior to trial, to the Government's witnesses in the courthouse cell block.

III. The admission of the testimony of the witnesses who were treated to cell-block viewings of the appellant prior to trial.

IV. The exclusion of appellant's profferred testimony as to his contemporaneous misidentification in another case.

In connection with Point I, appellant desires the Court to read the record of the preliminary hearing annexed to this case and the following pages of the reporter's transcript: 28-34, 43-44, 47, 63-66, 75-79, 94-95, 99-100, 102-103, 105-109, 116-117, 121-122, 124-125, 132-133, 136-137, 145-146,

156-158, 167-168, 205, 220, 460, 466.

In connection with Points II and III, appellant desires the Court to read the same pages of the reporter's transcript above set forth.

In connection with Point IV, the appellant desires the Court to read pages 377-397 of the reporter's transcript.

SUMMARY OF ARGUMENT

I. One of the functions of a preliminary hearing is to provide some discovery to the accused of the testimony against him. Appellant was completely deprived of this protection by the arbitrary manipulation of two unrelated charges against him so that it could give him a preliminary hearing on one, dismiss it, and try him on the other. This Court should not tolerate such a practice and should therefore reverse even in the absence of a showing of prejudice.

There was, in any event, substantial prejudice to the appellant's right to a fair trial as a result of the absence of a preliminary hearing. Since the only issue tendered by the Government was the identification of the accused by the victims, both the Government and the accused were vitally interested in what would happen when they confronted each other. The Government solved its difficulty by exhibiting the accused to its witnesses, in the absence of his counsel,

prior to trial. By doing so without permitting him to cross-examine them or to hear what they said it gave itself the benefit of a preliminary examination while denying it to the defendant.

Finally, the record in this case demonstrates beyond question that defendant was severely prejudiced at the trial by the absence of a preliminary hearing. His counsel had to make discovery during the trial. It was, as the trial court said, "the only way he can proceed." In making his discovery, however, he, in the United States Attorney's words, "opened the door" to prosecution testimony which otherwise would not have been offered. That testimony would not have been before the jury if there had been a preliminary hearing. And it convicted his client.

II. Wholly apart from the absence of a preliminary hearing, the conviction should be reversed because of the denial to appellant of the assistance of counsel at the pre-trial inspection of his person in the cell block which was conducted by the United States Attorney for the benefit of his witness. This took place after indictment, not as part of the investigation. And the absence of counsel was particularly offensive because, as in Escobedo, counsel was available and could have been notified. Although the Constitution

may not give an accused the right to be immune from the eyes of his accuser, it does give him the right not to be abused by an unfair and prejudicial exhibition in the absence of counsel. Counsel could have requested that there be a line-up rather than an individual inspection, and he could have observed, for later use at the trial, the comments and demeanor of the prospective witnesses.

III. It is prejudicial error, objected to by counsel at the trial, to have permitted witnesses to testify who had been accorded the pre-trial exhibition. Their testimony was so conditioned by the exhibition as to make its use inherently unfair. As the Fourth Circuit has recently held in a habeas corpus case, a state "may not rely on an identification secured by a process in which the search for truth is made secondary to the quest for a conviction." Here, when the case is on appeal from a federal conviction, even stricter standards are applicable. And the unfairness is particularly apparent in that the Government was able to utilize this identification procedure only because appellant was an indigent unable to raise bail.

IV. The conviction below should be reversed, finally, because the trial court sustained the United States Attorney's objection to, and excluded, testimony which demonstrated, in particularly dramatic fashion, the possibility that his identification by the prosecution's witnesses was mistaken.

ARGUMENT

I. THE CONVICTION OF APPELLANT SHOULD BE REVERSED BECAUSE OF THE ABSENCE OF THE PRELIMINARY HEARING REQUIRED BY RULE 5.

A. The Government Here Manipulated Two Unrelated Charges Against Appellant So That It Could Give Him A Preliminary Hearing On One and Try Him On The Other.

This Court, in Blue v. United States, 120 U.S. App. D.C. 65, 342 F.2d 894, cert. denied 380 U.S. 944, made clear that the provision in Rule 5 of the Federal Rules of Criminal Procedure for a preliminary hearing has a dual function. The preliminary examination serves, it is true, as the basis upon which a decision is made as to whether the accused should be released or held to answer the charge against him. It also serves, however, as a form of pre-trial procedure at which the defendant is given "a chance to learn in advance of trial the foundations of the charge and the evidence that will comprise the Government's case against him." 342 F.2d at page 901. Thus it is that the record of proceedings at the appellant's preliminary hearing on February 11 before the United States Commissioner on the DeMarco charge routinely recites (on a rubber stamp form) that "Defendant was informed of the complaint and of his right to have a preliminary hearing and to retain counsel.... Defendant was advised of his right to cross

examine witnesses against him..."

All of this was duly done with respect to the DeMarco charge. But the Government--which had in fact brought at least one of its witnesses as to the present case to the DeMarco hearing--chose not to accord any of these rights to appellant with respect to the present charge. Appellant was not given a defective hearing, as in Blue. He was given no hearing at all. Since he could be held on the DeMarco charge, the Government apparently felt that there was no necessity of giving him the benefit of a preliminary hearing on the present charge. And then later, after indictment on the present charge, the Government could continue to hold him on the indictment without preliminary hearing, and dismiss the charge on which a hearing had been held. Until the day of trial, the appellant's only information whatsoever as to "the foundations of the charge and the evidence that will comprise the Government's case against him (Blue v. United States, 342 F.2d at 901) was the indictment.

True of all G. J. originals

The manifest unfairness of this procedure and the necessity of impressing upon the Government that this neat finesse of the requirements of Rule 5 will not be tolerated should be enough, we believe, to require a reversal of the

conviction herein. The Court should, we believe, presume prejudice to the defendant when the Government proceeds in such arbitrary fashion. And we would urge the Court to reverse on this ground alone were it not for the fact that, as we show below, there is an easier ground--the manifest prejudice to the appellant which can be shown by this record to have occurred as a result of the absence of a preliminary hearing.

B. The Record Here Shows Substantial Prejudice As A Result of The Absence of A Preliminary Hearing.

In Blue this Court rejected the contention that a defect in the preliminary hearing procedure should constitute a per se basis for dismissal of the indictment or for reversal and a new trial--although it noted that the latter relief would in fact "convert the first trial into a rough equivalent of the defective or omitted preliminary hearing." 342 F.2d at 900. In the absence of a showing on the record of actual prejudice, the Court said, it must be assumed that counsel below waived any right to a preliminary hearing.

Subsequently, in Dancy v. United States, Nos. 18,366 and 18,716, decided October 14, 1965, this Court was again faced with a defective preliminary hearing (defective in

the sense that the appellant had not been advised of his right to assigned counsel). In Dancy, the Court again searched the record. Unlike Blue, however, the Court this time found prejudice in that:

> "defense counsel's conduct of the cross-examination of witnesses at the trial reflects a tentative and probing approach due to his ignorance of certain doubtful areas in the government's proof which might well have been known to him had he been able to participate in the preliminary hearing. At trial he attempted to capitalize on the contradictory testimony as to markings on the material evidence, but his effort was hampered by the difficulty he experienced in making this discovery during the trial itself. His absence at the preliminary hearing deprived counsel of the opportunity to make a clear presentation of the matter to the jury." (page 4)

Accordingly, it reversed so that, in the words of Blue, the first trial was in effect converted "into a rough equivalent of the defective or omitted preliminary hearing."

We believe that it is crystal clear that in this case prejudice far exceeding that shown in Dancy existed and that therefore the conviction of the appellant should be reversed.

First, here, unlike Blue and Dancy, there was no preliminary hearing at all. Appellant was denied not only the right to have counsel cross-examine the witnesses

against him, as in those cases, but the much more elementary right to know who they were and to see them.

Second, this case was peculiarly one in which a preliminary confrontation of witness and accused was necessary for both sides. This was an identification case, pure and simple. There was no evidence other than the identification of the accused by the victims to connect him in any way with the crime. The reaction of the witnesses when first confronted with the accused was therefore of the utmost importance.

Because this was the nature of the case, the absence of a preliminary hearing imposed a burden upon the Government as well as upon the defendant. Its witnesses had never seen the appellant. Their identification was based solely upon inspection of a photograph. The Government presumably was intensely curious as to whether its witnesses would identify the appellant when they saw him in the flesh. And the appellant, equally, was entitled to know what reaction the Government's witnesses would have when they first saw him. The necessity for a preliminary hearing in order that this confrontation could take place was therefore particularly clear.

The Government had a way of avoiding its difficulty. Both in April, when the case was first called for trial

but postponed, and in October, when it again was set for trial and again postponed (at the Government's request), the defendant was brought from the D. C. Jail to the cell block in the courthouse. And on both occasions the Government, after the postponement, took its witnesses down to the cell block and gave them an opportunity to inspect the appellant. It thus was able to satisfy itself as to their reactions and as to what their testimony would be. And it apparently took great care to see to it that appellant's counsel was not present when this preliminary inspection took place.

The Government, therefore, solved its problem. But it solved it in a way which made the prejudice of the appellant resulting from the lack of a preliminary hearing clearly apparent. It was not until trial that the appellant knew what these witnesses would say and what their reaction would be. And it was only at the trial that counsel for the appellant could explore, in a "tentative and probing manner," the certainty of the witnesses' identification. He made his discovery during the trial itself.

Third, the absence of a preliminary hearing forced counsel for appellant to take certain specific action at

the trial which in fact clinched the Government's case for it.

The direct testimony which the Government planned to produce in its case in chief consisted simply of a description of the robbery by those present and an identification of the defendant in open court by them. The Government carefully avoided, in direct examination of these witnesses, any questions concerning the identification of the accused by photograph shortly after the crime presumably because, as this Court recognized in Smith v. United States, 120 U.S. App. D.C. 247, 340 F.2d 797, in many jurisdictions "evidence of an extra-judicial identification is inadmissible, except when circumstances would justify admitting any prior consistent statement by a witness" (340 F.2d at 798) and the question has not been definitively decided in this Circuit.[5/]

Because of the absence of a preliminary hearing, counsel for appellant did not know what had happened at the police station right after the robbery. He had to inquire, before the jury, on cross-examination, of the first witness who identified appellant. And when he did,

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5/ Alternatively, the reason may have been that the photograph was a "mug shot" clearly indicating that appellant had a prior record.

by asking whether any pictures had been shown to the witness (T. 75-76), he--as the United States Attorney later pointed out and the trial judge confirmed (T. 108-109)--"opened the door." The witness answered that he had, indeed, been shown a picture. And then, on re-direct, the United States Attorney quickly capitalized on the opening. He immediately sent for the police jacket and had the photograph marked for identification (T. 76). He then took the witness on re-direct. Yes, the witness had been shown photographs, not one but five. Yes, he had picked appellant out from the photographs. Yes, the identification had been made within twenty minutes of the crime. Yes, the "mug shot" which the United States Attorney later introduced into evidence (T. 106) was the picture he had picked out. Once counsel had "opened the door," as the United States Attorney put it, the Government took full advantage of it.

And on final argument, he was able to say of this witness, with telling effect:

> "Not only did he say it to you, ladies and gentlemen at this trial, but he said it ten minutes after this crime was committed; not a day or two weeks or three weeks, but when Sergeant Herring handed him those five pictures, he looked through them and said, 'I saw the man,' right away, 'That's him.'
>
> "You know he saw him in person in this Court House in April. He told you on the stand

> that he positively identified him then and positively identified him at this trial." (T. 460)

He was able to do the same thing with other witnesses and then, to clinch the point, to put on the stand the police officer who had exhibited the photographs (T. 154-161) and hammer his testimony home to the jury:

> "The driver, as you know, took the bus around to Number Nine, and Detective Sergeant Herring appeared with the five pictures, and we have them for your consideration in the jury room.
>
> "May I have them, Mr. Clerk?
>
> (The pictures were handed to Government counsel)
>
> "Detective Sergeant Herring, of the Robbery Squad, came on board from a radio run; and he told you ladies and gentlemen that he had the pictures and he handed them up. Mr. Raniecky looked at them and immediately -- now, this is ten minutes, this is just ten minutes from the crime -- and he positively identified the defendant, whose picture is here. That is agreed to; there is no question about it." (T. 466)

All of this occurred, without question, solely because counsel for the accused inquired about the photographs on cross-examination. Indeed, the United States Attorney candidly disclosed this to the court:

> "MR. SMITH: Well, that is the reason that I brought Detective Sergeant Herring here today, since the pictures have been so important to the defense attorney, I changed my trial strategy because I had never intended as Your Honor knows to introduce any evidence regarding those pictures.
>
> "THE COURT: I know that.
>
> "MR. SMITH: I have not in this case --

it has always been introduced in this case on cross-examination. But now the door is opened, and counsel went into it. Thus on Tuesday evening I changed my trial strategy and asked the detective to have the sergeant come over this morning with the pictures he had, since it seems to be so important.

"THE COURT: Bear in mind that The Court is not in any way critical of the defense, because the Court doesn't know what problems the defense has. This may be the only strategy that he can follow. Do you follow me?

"MR. SMITH: I agree, Your Honor.

"THE COURT: I don't say that the question should not be asked. From a strategy standpoint it may be the only way he can proceed." (T. 167-168).

It was, indeed, as the Court said, the only way counsel for appellant could proceed--<u>because there had been no preliminary hearing</u>.

If the appellant had had the benefit of a preliminary hearing, it is perfectly clear that none of this would have occurred. At that hearing, the appellant's counsel could have inquired from any of the witnesses as to the circumstances of the identification at the police station and could have learned that any attempt to explore this matter on cross-examination at the trial would only have the effect of convicting his client. He would never have "opened the door" if he had some inkling of what lay behind it--and he could have learned precisely what was behind the door if he had an opportunity to cross-examine

the identifying witness at a preliminary hearing. Because, and precisely because, there was no preliminary hearing, he had to venture into this area in order to discover what the facts were. The discovery, as it turned out, was disastrous to his client.

II. THE JUDGMENT BELOW SHOULD BE REVERSED BECAUSE APPELLANT WAS DENIED THE RIGHT OF THE ASSISTANCE OF COUNSEL

If the Court should feel that the appellant has not met the test of the Blue and Dancy cases by showing sufficient prejudice because of the lack of a preliminary hearing, the conviction below should nevertheless be reversed because appellant was denied the assistance of counsel at the time he was brought before the United States Attorney and the witnesses against him to be exhibited to them.

It is elementary that the provision of the Sixth Amendment to the Constitution, which guarantees that in all criminal prosecutions the accused shall enjoy the right to have the assistance of counsel, requires the reversal of any conviction in which that right has been denied. It is not necessary, in order to reverse a conviction because of the denial of the right to counsel, that prejudice be shown. It is assumed that the denial of the right is prejudicial and any conviction which is had in a proceeding in which that right has been denied is void (and can be attacked even collaterally). Johnson v. Zerbst, 304 U.S. 458. See also, Hamilton v. Alabama, 368 U.S. 52; White v. Maryland, 373 U.S. 59, Noble v. Eicher, 79 U.S. App. D.C. 217, 143 F.2d 1001.

In recent years, there has been much discussion and some change in the law as to when the right of counsel attaches. In Escobedo v. Illinois, 378 U.S. 478, the Supreme Court went so far as to hold that the right to counsel attaches even before indictment, when the "investigation has begun to focus" on the accused.

Relying on Escobedo, it has recently been argued in this Court that the absence of counsel at a police lineup at which the accused was identified constituted denial of the right of counsel at a sufficiently critical stage of the proceeding as to require reversal. Williams v. United States, _____U.S. App. D.C._____, 345 F.2d 733. This Court denied the claim, holding that in view of the fact that the identification of the defendant, in the absence of counsel, took place "prior to indictment," there was no deprivation of the right to counsel. The nature of the Court's reasoning in Williams is emphasized by the concurring opinion filed by Circuit Judge Burger. In dealing with the contention that the defendant there was entitled to counsel under Escobedo, Judge Burger said the following:

> "There is nothing to indicate that Escobedo has any application to the lineup procedure, since the very fact that the defendant is so tentatively

> identified as the guilty actor as to require a lineup suggests that police attention has not yet 'focused' on him as a suspect to the degree required to bring Escobedo into play." 345 F.2d 733 at 736 (emphasis in original).

This case resembles Williams--except for one critical factor. Appellant here was subjected to inspection without a lineup procedure, in the absence of counsel, after indictment. Indeed, the appellant here was subject to a visual interview by the United States Attorney and the witness against him, in the absence of counsel, on the very day that he had been scheduled to be tried. It is thus clear that here, unlike Williams, the procedure had focused on the defendant to a degree which required the assistance of counsel, as the Supreme Court has said "at every step in the proceedings against him." Powell v. Alabama, 287 U.S. 45, 69. The opinions of this Court in Williams, therefore, clearly indicate that the conviction in this case must be reversed.

Wholly apart from the language in Williams, it is clear that the appellant was denied the effective assistance of counsel at a critical stage in the proceeding against him. The denial of the right to counsel is particularly egregious because the actions of the United States Attorney in having the defendant brought out to be

inspected by the Government's witnesses took place at a time when the appellant's counsel was available and could have been present. (Cf. Cephus v. United States, ____ U.S. App. D.C. ____, 352 F.2d 663, 664, in which this Court laid stress on the fact that in Escobedo and Massiah v. United States, 377 U.S. 201, there was a purposeful exclusion of counsel.)

This was particularly true at the October "viewing." Appellant had been brought to the courthouse for trial. His counsel was present. The United States Attorney asked for a continuance. When the court placed the case at the foot of the calendar, the United States Attorney could have informed counsel for appellant that he intended to have the appellant inspected by the Government's witnesses. The United States Attorney, however, chose not to inform counsel for the appellant and allowed him to return to his office. Having done this, he promptly proceeded to take his witnesses to the cell block in the basement of the courthouse and have them inspect the defendant. It is almost as if the procedure had been specifically designed so as to avoid the possibility that the defendant's counsel would be present when the inspection occurred.

It may, perhaps, be contended that this viewing procedure was not a "critical stage" in the proceeding in that the defendant made no statement or confession, unlike Escobedo and Massiah, supra. Cf. Kennedy v. United States, ____U.S. App. D.C. ____, 353 F.2d 462, 466: "...[U]nlike the absolute right to stand mute, the Constitution confers no right on an accused to be immune from the eyes of his accusers."

We agree. But the absence of an absolute right to be immune from the eyes of accusers is not the same thing as the absence of a right to be immune from exhibition by one's accusers under circumstances which are essentially unfair and unjust. Inspection at the scene of the crime, as in Kennedy, is one thing. At that stage, concededly, "the police, not suspects, must be in control.: 353 F.2d at 466. The notion that counsel might be able to persuade the police to assemble a lineup while they are engaged in investigating the crime may be far-fetched. The notion that counsel might be of genuine assistance to an accused, and should be required to be present, when he is exhibited to the prosecution's witnesses in the courthouse cell block on the day set for trial is quite a different thing.

There are several things which under these circumstances counsel might have done to assist the accused. First, counsel could have insisted that the defendant be viewed along with several other prisoners so that the identification, if made, would be fairly made, and so that the witnesses would not be subconsciously guided to the identification which the prosecution wished. This was not done. The only prisoner viewed by the Government's witnesses was the appellant. The question was not whether the witnesses could pick the appellant out but whether the sole individual presented to the witnesses by the prosecution was the man they had seen at the robbery.

This failure to provide a fair identification procedure was prejudicial to the appellant because there is a strong tendency for a witness to hold to an identification once made. Accordingly, once the identification had been made in the cell block, the likelihood is that it would be more positively and more firmly held at the trial. As Professor Wigmore has noted (Wigmore on Evidence, Section 1130, p. 208), "after all that has intervened, it would seldom happen that the witness would not have come to believe in the person's identity."

Second, even if the inspection had taken place in precisely the same manner and counsel for the appellant had not been able to object to the unfair aspects of the identification procedure, substantial benefits would accrue to the defendant merely because his counsel had attended as an observer. The demeanor of the witnesses when first faced with the defendant, the words which they may have spoken to the United States Attorney, the reactions, if any, to their first inspection of the man being tried for the crime which they witnessed, all of these would have been extremely useful to counsel for the defendant in conducting his cross-examination of those witnesses at the trial. All of these advantages were denied to him by the device of holding the inspection in the absence of counsel.

In sum, in this case, unlike Williams v. United States, ____U.S. App. D.C.____, 345 F.2d 733, the visual inspection in the absence of counsel took place after indictment, not when appellant was a mere suspect. And in this case, unlike Kennedy v. United States, ____U.S. App. D.C., 353 F.2d 462, the inspection, in the absence of counsel, took place in the framework of a judicial procedure, in the courthouse, not as part of the investigation of the crime. Under those circumstances the fruit of the visual inspection

--the persuasive identifications made later at the trial --should have been excluded just as confessions obtained in the absence of counsel were excluded in Escobedo and Massiah, supra.

III. THE ADMISSION OF THE TESTIMONY OF THE WITNESSES WHO HAD INSPECTED APPELLANT IN THE CELL BLOCK WAS ERROR.

We have so far urged, first, that the absence of the preliminary hearing specified in Rule 5 under the peculiar circumstances of this case was so prejudicial to the appellant as to require reversal. We have urged, second, that the admission of the testimony of the witnesses to whom appellant was exhibited in the cell block prior to trial was error because appellant was denied the assistance of counsel at the inspection. We now urge, third, that the nature of the inspection was such that the admission of the subsequent testimony was error, wholly apart from Rule 5 and the provisions of the Sixth Amendment.

The point is a simple one. Whether or not the procedure could have been corrected if counsel had been present, what it in fact constituted was a method by which the Government did "set up" its witnesses in an essentially unfair way. There was no lineup. The witnesses, whose previous identification by photograph may have been uncertain, were taken to the cell block, invited to inspect appellant, and asked whether he was the man.

Clearly, this kind of arrangement was such as to poison any later identification in the courtroom. The witnesses were psychologically conditioned to make the identification

in the cell block and then, when later brought into court, would obviously testify positively, if only to confirm their earlier statements. And this is equally true of the driver of the bus, who was given his chance to observe the appellant at the time he was being charged with another armed robbery, a charge which was subsequently dismissed.

The language of a unanimous Court of Appeals for the Fourth Circuit, sitting en banc, in Palmer v. Peyton, No. 9609, decided April 6, 1966, is particularly instructive on this issue. In that case, Palmer had been convicted of rape and robbery. The assailant's face, when the events occurred, was covered by a paper bag. He had, however, spoken to the complaining witness. The police secured the accused's identification by having him repeat those same words, unseen by the witness. No other voices were used for comparison.

After conviction, the prisoner sought release by habeas corpus on the ground that this identification procedure was so unfair as to constitute a denial of due process in violation of the Fourteenth Amendment. The Court of Appeals unanimously reversed the dismissal of the writ by the District Court. It said:

> "The opportunity for suggestion inherent in the procedure used to secure this identification is manifest.

"....

"Any identification process, of course, involves danger that the percipient may be influenced by prior formed attitudes; indeed we are all too familiar with instances in which supposedly 'irrefutable' identifications were later shown to have been incorrect.5/ Where the witness bases the identification on only part of the suspect's total personality, such as height alone, or eyes alone, or voice alone, prior suggestions will have most fertile soil in which to grow to conviction. This is especially so when the identifier is presented with no alternative choices; there is then a strong predisposition to overcome doubts and to fasten guilt upon the lone suspect.

"To alleviate the effect of such influences upon a complaining witness, a lineup is generally regarded by police authorities as essential.6/ ...

"...In their understandable zeal to secure an identification, the police simply destroyed the possibility of an objective, impartial judgment by the prosecutrix as to whether Palmer's voice was in fact that of the man who had attacked her. Such a procedure fails to meet 'those canons of decency and fairness'7/established as part of the fundamental law of the land. A state may not rely in a criminal prosecution upon evidence secured by pumping a man's stomach,8/by breaking into his home,9/or by employing subtle psychological methods on him;10/nor may it rely on an identification secured by a process in which the search for truth is made secondary to the quest for a conviction."11/

"5/ See Borchard, Convicting the Innocent, p. xii (1932); Frank, Not Guilty, p. 31 (1957).

"6/ Criminal Investigation and Interrogation, Gerber & Schroeder ed. § 22.20 (1962).

"7/ Malinsky v. New York, 324 U.S. 401, 416-17 (1945).

"8/ Rochin v. California, 342 U.S 165 (1952).

"9/ Mapp v. Ohio, 367 U.S. 643 (1961).

"10/ Leyra v. Denno, 347 U.S. 556 (1954).

"11/ At the reargument of this case, we requested discussion of the possible effect of the fact that Palmer was without counsel at the identification, in light of Escobedo v. Illinois, 378 U.S. 478 (1964). Cf. Stovall v. Denno, F.2d , 34 U.S.L. Week 2423 (Jan. 31, 1966). We do not reach Escobedo problems, however, since we conclude that the entire atmosphere surrounding the identification was a violation of due process." (Slip Opinion, pp. 6, 7, 8-9).

Although the identification procedure was different here, the words of the Fourth Circuit are, we believe, particularly apt. And they have additional force here for two reasons.

First, this is an appeal, not an application for release on habeas corpus from a judgment imposed by another court. The unfairness need not rise to the level of an unconstitutional denial of due process of law in order to justify reversal. This Court, as the supervisory body, can insist on more rigorous standards of fairness than are appropriate where jurisdiction exists only to order release from unconstitutional confinement.

Second, the point was specifically raised at the trial by accused's counsel, not as an afterthought.

Third, the unfairness here is particularly egregious

since the Government was able to utilize this procedure only because appellant is an indigent. In Palmer, the identification procedure was a part of the search for a suspect, as in Kennedy v. United States, ____U.S. App. D.C._____, 353 F.2d 462. Here the appellant had been indicted. The Government was entitled to hold him--not as a device to exhibit him under the most unfavorable conditions to its witnesses--but simply to assure his presence for trial. If he had the resources to provide the bail of $10,000 which had been set for him, the Government would have been denied the opportunity of which it took such good advantage. While the Government may, perhaps, be entitled to have its witnesses view the accused during his confinement, the circumstances of the viewing in the cell block were such as to substantially prejudice him because of that confinement. And, as the United States District Court for the Eastern District of Pennsylvania held in Butter v. Crumlish, 229 F. Supp. 565 (1964), such use of his body is improper. The testimony of the witnesses should, therefore, have been excluded.

IV. THE COURT BELOW ERRED IN NOT PERMITTING THE TESTIMONY OF THE WITNESS BROWN TO BE HEARD BY THE JURY

The evidence against the appellant in this case was, as has already been stated, solely his identification by some of the witnesses to and the victims of the robberies. (Of the six witnesses called by the Government in its case in chief, four identified the defendant, two did not.) In an effort to demonstrate to the jury the inherent weakness of this type of evidence as applied to the defendant, counsel produced a witness who had identified the appellant when he was arrested on February 4, 1965, with similar positiveness, as the perpetrator of a different robbery which had taken place on November 29, 1964. The witness not only had identified the appellant at the time he was arrested, but when he appeared at this trial under subpoena, without knowledge as to the purpose of his testimony, testified with great assurance that the defendant was the man who had robbed him. Counsel then proved that on the date of that robbery, November 29, defendant was in jail. All of this testimony was given, however, outside the presence of the jury, because the United States Attorney had objected to its introduction. After hearing the testimony, the trial court sustained the United States Attorney's objection and the evidence was not heard by the jury.

It is submitted that this exclusion constituted reversible error. The trial court apparently excluded the testimony on the ground that the defendant had not been charged by the police as a result of the witness' identification of him. The judge seemed to believe that the failure of the police to charge the defendant demonstrated that they had found him innocent and that, therefore, the testimony was inadmissible.

This ruling, of course, completely misconceived the purpose of the testimony. Counsel was not attempting to show that the police had falsely charged the defendant but simply that this particular defendant was one who could be, and indeed had been, contemporaneously identified by the victim of a robbery with precisely the same amount of assurance that the victims of this robbery had identified him and that this identification was false. This was clearly relevant to the defense's principal contention--that the defendant had been misidentified in this case.

The objection of the United States Attorney to the testimony was apparently different than the objection of the District Judge. The United States Attorney objected on the ground that the introduction of this testimony would open the door to further testimony that the defendant had

been identified by other witnesses with respect to other robberies. Ordinarily, of course, testimony concerning other offenses is inadmissible. But if counsel for the defendant made a conscious choice that the opening of this door and the waiving of any objection to identification testimony in connection with other offenses would be helpful to his client, clearly he should have been permitted to exercise that choice. Perhaps, if he had done so, it would then have been proper for the United States Attorney to bring in his other witnesses who had properly identified the defendant. If so, it wouldbe because the defendant's counsel had chosen to make an issue of the fact that his client was a person who was likely to be misidentified.

But that is not the question here. The question here is whether the defendant can, if he wishes, and believes it to be to his advantage, open this door in order to demonstrate to the jury the inadequacy of the prosecution's case. We submit that the defendant had the right to do so.

The situation is not unlike the choice which is presented when the defendant must decide whether to take the stand in his own defense. Ordinarily, evidence of other convictions is not admissible against him; he must be convicted on the evidence of this case and this case only.

If he chooses to remain silent, other convictions cannot be brought to the attention of the jury. But, if he believes that his own testimony will be helpful in avoiding conviction, he can choose to testify and, in so choosing, he opens the door to the proof by the prosecution that he has been convicted of other offenses.

Just so here, appellant should have been given the right to prove that he had been contemporaneously misidentified in connection with other crimes, if he chose to do so, in order to persuade the jury that he had been misidentified in this case even though evidence of other charges against him would ordinarily be inadmissible over his objection. The refusal of the District Court to permit the testimony constituted reversible error.

Respectfully submitted,

DAVID E. FELLER
1001 Connecticut Ave., N.W.
Washington, D. C. 20036

Attorney for Appellant
(Appointed by this Court)

May 2, 1966.

FORMAS FOR WITNESSES ISSUED:

_____, 19____, for (name of witness) _____

equest of (name of party) _____

Substance of return _____

_____

_____, 19____, for (name of witness) _____

equest of (name of party) _____

Substance of return _____

_____

_____, 19____, for (name of witness) _____

equest of (name of party) _____

Substance of return _____

_____

RELIMINARY EXAMINATION:
(Not to be used if case was disposed of at first presentation)

Date Feb. 11, 1965 Appearances for { United States (Name) Earl J. Silbert (Address) _____ ; Accused (Name) Bruce D. Beaudin (Address) Legal Aid Agency

ESSES FOR UNITED STATES: (List names and addresses)

_____, _____

Michael W. DeMarco 3900 16th st. N.W.

_____, _____

_____, _____

WITNESSES FOR ACCUSED: (List names and addresses)

_____, _____

_____, _____

_____, _____

_____, _____

Witness payroll containing _____ names certified to United States Marshal for payment _____, 19____

Proceedings taken hearing requested and held:

Witness DeMarco testified that on Dec.30,1964 at about 9 pm he was parking his auto across from his home on Shepherd st.; that two men approached and one man got into his car; that this man held a gun and pointed it to his head and said give me all your money; that he gave this man between $35 and $40.; that the man asked is that all you got and he replied yes and the man then went thro his pockets; that this man and the otherman who stood outside of the car then took off in an auto; that the Defendant here is the man who got into his car, held the gun and robbed him.

Probable Cause Shown

Def. Mot. to Reduce Bond - Opposed by Govt.-Def. now identified in four additional robberies; - Motion Denied.

Outcome DEFENDANT HELD TO ANSWER IN UNITED STATES DISTRICT COURT.

Bail fixed February 11, 1965 Amount, $ 10,000. Bonded _____, 19____, by cash

sited by (name) _____ Address _____

mitted to clerk of district court _____, 19____

by surety (ies) _____ Address _____

_____ Address _____

justified by affidavit _____, 19____ Committed to D. C. Jail

February ___, 19 65

fied to be a correct transcript.

Made this 12th day of February, 19 65

Transmitted to Clerk of United States District Court for the

ict of Columbia _____, February 12, 1965

John M. Lewis

United States Commissioner.

A.O. 100
(Rev. 1-59)

FILED

FEB 12 1965

HARRY M. HULL, Clerk

UNITED STATES COMMISSIONER

DISTRICT OF Columbia

RECORD OF PROCEEDINGS IN CRIMINAL CASES

M.J. 9-239-65

BEFORE SAM WERTLEB (Name of commissioner) — U. S. Court House, Wash. 1, D. C. (Address)

COMMISSIONER'S DOCKET NO. 15 CASE NO. 317

THE UNITED STATES

vs.

Malcus Theodore Clemons

Complaint filed on Dec. 31, 1964, by Donald J. Allen
Official title Det. Robbery Squad MPDC, charging violation
United States Code, Title ____, Section ____, on Dec. 31
1965, at Washington in the
division of the ____ district of Columbia
as follows: Violation of Title 22 D.C. Code,
section 2901 - robbery at gun point - took fr
the person of Michael W. DeMarco, $36.00 in
cash and personal papers.

(Here insert brief summary of facts constituting offense charged)

WARRANTS ~~[illegible]~~ ISSUED:

Date Dec. 31, 1964 Warrant/~~Summons~~ for Malcus Theodore Clemons (Name of defendant)
to (name and title of officer) Chief of Police or Any Member of MPDC
Substance of return Arrest of Malcus Theodore Clemons on Bebruary 4, 1965

Date ____ Warrant/Summons for ____ (Name of defendant)
to (name and title of officer) ____
Substance of return ____

PROCEEDINGS ON FIRST PRESENTATION OF ACCUSED TO COMMISSIONER:

Date Feb. 4, 1965 1:32 PM Arrested by MPDC on warrant of Comm. Wertleb (Name of issuing officer)

Appearances: for United States ____ (Name) (Address)
for accused ____ (Name) (Address)

Proceedings taken Complaint prepared. Defendant was informed of the complaint and of his
(Here insert with dates, when appropriate, a seriatim account of essential steps taken at hearing such as "complaint prepared,"
if arrest is without warrant: "defendant informed of complaint and right to retain counsel and preliminary hearing": "preliminary examination waived,"
if that is the fact; any adjournments taken, etc.
right to have a preliminary hearing and to retain counsel. Defendant was not required to
make a statement and was advised that any statement made by him may be used against him.
Defendant was advised of his right to cross-examine witnesses against him and to introduce
evidence in his own behalf.

Outcome Case Ctd. to Feb.11, request of Def. to obtain and counsel counsel

Bail fixed February 4, 1965 Amount, $10,000. Bonded ____, 19____, by c
deposited by (name) ____ Address ____
transmitted to clerk of district court ____, 19____ [or] by su
(name) ____ Address ____
(name) ____ Address ____
justified by affidavit dated ____, 19____, [or] committed to D.C. Jail
on February 4, 1965

FEB - 4

United States District Court

FOR THE DISTRICT OF COLUMBIA

FILED

APR 12 1965

HARRY M. HULL, CLERK

UNITED STATES

vs.

MALCUS THEODORE CLEMONS

Defendant

GRAND JURY

~~Criminal~~ No. 239-65

On this 12th day of April, 1965, came the attorney of the United States, ~~the defendant in proper person and by his attorney~~, and upon consideration of the government's oral motion for leave to dismiss ~~the indictment~~ in the above entitled case, it is ordered that leave to dismiss ~~the indictment~~ be and the same is hereby granted.

Whereupon the United States Attorney dismisses the above entitled case in open Court.

The defendant is released. Release issued.

A TRUE COPY

ROBERT M. STEARNS, Clerk,

By: _____ Deputy Clerk

BY DIRECTION OF:

JOHN J. SIRICA
Presiding Judge

Present:

United States Attorney

Criminal Court # 1

By: Donald Hirsch
Assistant U. S. Attorney

HARRY M. HULL, Clerk

E. Markwalter
Official Reporter

By: _____
Deputy Clerk

JOINT SUPPLEMENTAL MEMORANDUM

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,846

MALCUS T. CLEMONS,

Appellant

v.

UNITED STATES OF AMERICA,

Appellee

No. 21,001

DAVID E. CLARK,

Appellant

v.

UNITED STATES OF AMERICA,

Appellee

No. 21,249

ALVIN C. HINES,

Appellant

v.

UNITED STATES OF AMERICA,

Appellee

Appeal From the United States District Court
For The District Of Columbia

WILLIAM W. GREENHALGH
FOY R. DEVINE
424 Fifth Street, N. W.
Washington, D. C. 20001

Attorneys for Appellant Clemons
(Appointed by this Court)

WILLIAM W. GREENHALGH
JOHN PERAZICH
424 Fifth Street, N. W.
Washington, D.C. 20001

Attorneys for Appellant Clark
(Appointed by this Court)

LAURENCE D. HOLLMAN
SHERWOOD B. SMITH, JR.
Klagsbrunn & Hanes
710 Ring Building
Washington, D. C. 20036

Attorneys for Appellant Hines
(Appointed by this Court)

FOREWORD

Counsel for appellants have chosen to file this joint supplemental memorandum in order to discuss certain issues common to all three cases set to be heard by this Court en banc on Friday, August 2, 1968. This memorandum is not intended to be exhaustive of the questions presented by these cases, and counsel for individual appellants request this Court to also consider the briefs and memoranda which have been filed in their respective cases.

I N D E X

TABLE OF CASES

Miscellaneous

INTRODUCTION

Wade, Gilbert and Stovall

Counsel for appellants submit that the trilogy of Supreme Court decisions[1/] regarding eyewitness identifications sought to establish the following scheme on the admissibility of eyewitness identifications and testimony regarding pre-trial confrontations.

The operative fact, and usually the focus of attention, in a Wade type case is a pre-trial confrontation between the identifying witness and the accused which was arranged by the police or prosecutor. See Hemphill v. United States, #21,432 decided June 12, 1968.

I. The Admissibility of an In-Court Identification by the Witness.

A. Burden of the Defendant. If the defendant wishes to exclude an in-court identification, he must establish that the pre-trial confrontation between the identifying witness and the defendant was tainted by some illegality.

1. If the confrontation took place before June 12, 1967, the date Wade, Gilbert and Stovall were decided, then the taint must be established by showing that the confrontation was "so unnecessarily suggestive and conducive

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1/ United States v. Wade, 388 U.S. 218 (1967); Gilbert v. California, 388 U.S. 263 (1967); Stovall v. Denno, 388 U.S. 293 (1967).

to irreparable mistaken identification..." that the defendant was denied due process of law. Stovall v. Denno, supra at 302.

2. If the confrontation took place after June 12, 1967, then the taint may be established in either of two ways:

(a) showing that no counsel was present at the confrontation to represent the accused, and that the accused did not intelligently waive his right to counsel at this critical stage,[2/] or

(b) showing that although counsel was present, the confrontation was nevertheless so unnecessarily suggestive and conducive to irreparable mistaken identification that the accused was denied due process of law.

B Burden of the Government. If the defense succeeds in establishing that the pre-trial confrontation was tainted, the burden shifts to the government to "establish by clear and convincing evidence that the in-court identifications were based upon observations of the suspect other than

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2/ The Supreme Court explicitly stated that this method of establishing taint may be removed in the future by the establishment of "systematic and scientific" identification procedures which eliminate the risks of abuse, unintentional suggestion and impediments to meaningful confrontation at trial. United States v. Wade, supra at 239 n. 30 (1967).

the [tainted] lineup identification." United States v. Wade, supra, at 240.[3/]

II. The Admissibility of Testimony Concerning the Pre-trial Confrontation and Identification.

A. Burden of the Defendant. If the defendant desires to exclude testimony about any pre-trial identification or confrontation, he again has the burden of establishing that the confrontation was tainted by some illegality. With regard to establishing taint, the same rules apply here as in the exclusion of in-court identifications. If the defendant fails to carry his burden, then the testimony in question is admissible, assuming it does not violate any other rule of evidence.

B. Burden of the Government. If the defense succeeds in establishing that a pre-trial confrontation was tainted, the testimony relating to such an identification must be excluded. Since the testimony as to the tainted identification is the direct result of an illegal identification procedure, the government is not entitled to an

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3/ The test was also stated:
"Whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." United States v. Wade, supra at 241.

See also, People v. Caruso, 436 P.2d 336 (Cal.Sup.Ct. 1968) United States v. Benjamin O'Conner, 282 F.Supp. 963, 967 (D.C.D.C. 1968).

opportunity to show that the testimony had an independent source. Gilbert v. California, 388 U.S. 263, 272-73 (1967).

Crime Control Act

On June 19, 1968 the Omnibus Crime Control and Safe Streets Act of 1968 became law. Pub. Law 90-351. Title II of that act amended Chapter 223, title 18, United States Code by adding section 3502, which states in full:

> The testimony of a witness that he saw the accused commit or participate in the commission of the crime for which the accused is being tried shall be admissible in evidence in a criminal prosecution in any trial court ordained and established under article III of the Constitution of the United States.

Issues Discussed Herein

In view of the foregoing, counsel for appellants intend to discuss the following issues in this memorandum:

1. What criteria should be applied when determining whether the defendant has established that the pre-trial confrontation was so unnecessarily suggestive and conducive to irreparable mistaken identification as to deny the defendant due process of law?

2. What criteria should be applied when determining whether the government has established by clear and convincing evidence that the in-court identification was based upon observations of the defendant other than at the tainted confrontation?

3. What effect does Title 18 United States Code, section 3502 have upon the admissibility of eyewitness identifications and testimony regarding pre-trial confrontations?

DISCUSSION

Suggested Criteria Applicable to Claim of Due Process Violation

The test of a due process violation in this context was articulated by the Supreme Court as whether the pre-trial confrontation was

> "so unnecessarily suggestive and conducive to irreparable mistaken identification that he [the accused] was denied due process of law... However, a claimed violation of due process of law in the conduct of a confrontation depends on the totality of the circumstances surrounding it..." Stovall v. Denno, 388 U.S. 293, 302 1967.

The same test was held applicable by the Supreme Court to pre-trial identifications by photograph. Simmons v. United States, 390 U.S. 377, 384 (1968).

The test for a violation of due process seems to involve three elements:

I. Possible susceptibility of the identifying witness to any suggestions which may have been present in the identification procedure, see Wade v. United States, 388 U.S. 218, 230 (1967).

II. The degree of suggestion actually present in the identification procedure, Ibid.

III. The reasons, if any, which compelled the police or prosecutor to arrange the confrontation in the manner and at the time it was held, see Stovall v. Denno, supra at 302.

These elements should be analyzed in two steps.

A. Elements I (Susceptibility of the Witness) and II (Suggestivity of the Procedure) are weighed together to determine whether the confrontation was likely to produce an irreparable mistaken identification. The more susceptible the witness and the more suggestive the procedure, the greater the likelihood of irreparable mistaken identification.

B. Element III (Reasons Compelling Confrontation) is then weighed against the likelihood of irreparable mistaken identification to determine whether there has been a violation of due process. The greater the likelihood of irreparable mistaken identification and the weaker the reasons compelling confrontation, the quicker the Court should be to find a violation of due process.

The nature of a due process claim is such that it is impossible to articulate clear-cut tests for its measurement. Nevertheless it is possible, indeed quite useful, to frame the types of inquiries that should be made when a due process claim arises. Counsel for appellants, therefore, suggest several criteria to be considered in evaluating the three elements of the due process test. The list is intended to be thorough, but not exhaustive.

ELEMENT I - Susceptibility of the Witness.

A. Quality of the Original Observation

This factor is quite important in measuring the susceptibility of the witness, for if he makes a good

observation at the scene of the crime, he will be better able to reject the innocent suspects and make an accurate identification. See People v. Smith, 66 Cal.Rptr. 551, 555 (Dist.Ct. App. 1968). An excellent measurement of the witness' original observation and perception is the particularity of the witness' description recorded before he is shown the suspect or his photograph. See, United States v. O'Conner, 282 F. Supp. 963, 966 (D.C.D.C. 1968). Other matters relevant to the quality of the original observation are: (1) length of observation, (2) lighting at the scene of the observation, (3) distance and obstructions between witness and criminal, (4) quality of witness' eye sight, (5) characteristics of the criminal which could have been observed by the witness, (6) matters which may have distracted the witness or interfered with his powers of perception while the criminal was available for observation, (7) the reasons that the witness may or may not have had for carefully observing the criminal during the period of observation and (8) how many times, if any, had the witness seen the suspect prior to the observation at the scene of the crime.

B. Time Lapse Between Original Observation and Pretrial Confrontation.

With the passage of time after the original observation, it is only natural that the witness would tend to forget what the criminal looked like. See People v. Ballott,

20, N.Y.2d 600, 233 N.E.2d 103, 286 N.Y.S.2d 1 (1967). The weaker his memory of the criminal, the greater the susceptibility of the witness to suggestion. Of course, the effect of the passage of time may be discounted if some method was used to preserve the witness' memory by such methods as sketches or composite drawings.

C. Physical Characteristics Relied On By The Identifying Witness.

Upon what part of the accused's personality was the identification based? If the witness is able to base his identification upon numerous and distinctive characteristics, then the identification is probably not the result of a suggestive procedure. On the other hand, if the witness relies on only one rather non-distinctive characteristic, then the identification should be closely scrutinized. Palmer v. Peyton, 359 F.2d 199 (4th Cir. 1965).

D. Confrontations Between the Witness and Other Suspects.

Another test of susceptibility is how many other suspects the witness had viewed before identifying the accused. If he had rejected a large number of suspects before making the identification that would tend to show a resistance to suggestion. This is particularly true if the earlier procedures were quite suggestive. See People v. Blackburn, 66

Cal.Rptr. 845 (Dist.Ct.App. 1968). On the other hand, if the witness had also identified someone else as being the criminal, his identification of the accused would be quite suspect. See Rath v. Maryland, 240 A.2d 777 (Md.Ct.Spec.App. 1968).

E. Training And Experience of Witness in Making Observations.

Of course, if the witness had been trained in making observations of people for the purpose of noting identifying characteristics, the Court might reasonably assume that the witness would make better observations than witnesses with an untrained eye. Law enforcement officers, for example, may have trained themselves in the course of their work to make careful observations of persons wanted for various crimes. The Court may also find it appropriate to give similar consideration to witnesses who have had more than the average experience in making observations and identifications of strangers.

F. Degree of Certainty Shown By the Witness at Time of Making the Identification.

If at the time of first seeing the suspect or his photograph, the witness immediately made a positive identification, this would tend to show that the witness was not very susceptible. Conversely, if the witness was very doubtful at first and developed his certainty after longer observation or

after receiving other information, this fact may be considered an indication of susceptibility in the witness. See People v. Ahmed, 20 N.Y.2d 958, 233 N.E.2d 854, 286 N.Y.S.2d 850 (1967).

G. Racial Differences Between the Witness and the Criminal.

Counsel for appellants urge this Court to take judicial notice that it is ordinarily more difficult for a witness to observe and later recognize a person who is not a member of his own race. Therefore, the races of the witness and the perpetrator of the crime should be considered as a relevant factor in evaluating the susceptibility of the witness.

H. Possible Motivation on the Part of the Witness for Making an Incorrect Identification.

If the crime is of a nature which is likely to make the witness highly emotional, he might be motivated to make a prompt identification and thus fix upon the first possible suspect. See United States v. Wade, 388 U.S. 218, 230 (1967).

ELEMENT II - Suggestivity of the Procedure

A. Number of Persons Presented to the Witness.

One of the primary considerations in evaluating the suggestivity of an identification procedure is the number of persons presented to the witness who might logically be identified as the offender. At one end of the suggestivity spectrum is the showup, a procedure in which only one person

is shown to the witness. Stovall v. Denno, 388 U.S. 293, 302 (1967), Roosevelt Wright, Jr. v. United States, #20,153 (decided Jan. 31, 1968). At the other end of the spectrum is the model lineup where a large number of persons generally similar to the suspect are presented to the witness in a line. Falling between these extremes are the many variations of identification procedures that bring together a witness and suspect in confrontation. In order to evaluate an identification procedure with regard to this factor one might inquire: (1) where was the procedure held? (2) how many persons were present at the identification procedure? (3) what role was played by each person present? (4) how many of the persons present were known to the witness before the procedure washheld? (5) how many suspects was the witness attempting to identify? (6) how many persons would the witness have had to exclude from consideration because of distinctive physical characteristics such as; age, sex, race, height, weight, complexion, mannerisms, et cetera? and (7) did the suspect or suspects stand out in any way because of the way in which they were presented to the witness? See People v. Caruso, 436 P.2d 336 (Cal.Sup.Ct. 1968).

B. Direct Suggestion

One of the most suggestive factors possible in any confrontation is the fact that the police or prosecutor have gone to the trouble to arrange a confrontation. There-

fore, if the witness finds out which of those persons presented to him are suspected by the police, the suggestivity element will be quite strong. See People v. Douglas, 66 Cal. Rptr. 492, 493 (Dist.Ct.App. 1968). Even if the witness finds out indirectly or inadvertently, the suggestivity is still present. Consequently the Court should closely scrutinize the entire identification procedure to detect any such hint to the witness. It should be incumbent upon the police, prosecutor and defense counsel to guard against the possibility of any such direct suggestion.

C. Witness' Knowledge of Other Evidence In the Case

If the witness is aware of any other evidence which tends to identify one of the persons presented as the perpetrator of the crime, then that evidence will obviously be a source of suggestivity. Some illustrations of such other evidence are: fingerprints taken from the scene of the crime, items familiar to the witness seized from the suspect, and prior identifications of the suspect by other witnesses. See Palmer v. Peyton, 359 F.2d 199, 201 (4th Cir. 1965); People v. Stoner, 422 P.2d 585, 55 Cal.Rptr. 897 (Cal.Sup.Ct. 1967).

D. Witness' Prior Exposure to Suspect

If the suspect identified by the witness had been presented to the witness by the police or prosecutor in

earlier identification procedures, the witness is likely to be influenced by the earlier confrontation. Such prior confrontations should be examined whether they were photographic or in corporeal. Their suggestive effect would depend, of course, on the number and respective suggestivity of each confrontation. Cf. United States v. Hutto, 393 F.2d 783 (4th Cir. 1968).

E. Other Persons Similarly Presented to the Witness

In many cases there may be no dispute that the manner in which the suspect was presented was, to a limited extent, suggestive. The question is what degree of suggestivity existed. A relevant inquiry in such cases would be whether there were any other persons presented to the witness in a similarly suggestive manner. If the witness could logically have identified these other persons but did not, this fact may tend to indicate that the confrontation was not extremely suggestive. See Gilbert v. California, 388 U.S. 263, 270 n.2 (1967).

F. Other Witnesses Who Were Not Present at the Confrontation

Of course there are numerous factors which affect a witness' ability to make a positive identification of a defendant. Nevertheless, one of the primary factors is the number and suggestivity of pre-trial confrontations.

Assume, for example, that two witnesses are roughly equivalent in all other factors but were exposed to different types of pre-trial confrontations. If one witness identifies the defendant and the other can not identify him, it may be inferred that the pre-trial confrontations were markedly different in their degree of suggestivity.

ELEMENT III - Reasons Compelling Confrontation.

Often police or prosecutors are put in a position where they feel compelled to hold a confrontation for identification at a time, place and under circumstances which are admittedly conducive to irreparable mistaken identification. The Supreme Court has indicated, however, that since a violation of due process depends upon a totality of the circumstances, the reasons compelling a suggestive confrontation must be balanced against the likelihood of mistaken identification arising from the procedure. See Simmons v. United States, 390 U.S. 377, 384-85 (1968); Stovall v. Denno, 388 U.S. 293, 302 (1967). Cf. Wise v. United States, 127 U.S. App. D.C. 279, 383 F.2d 206 (1967).

It is impossible to foresee and evaluate the difficulties which may arise in assembling the witness, suspect, other persons to stand in the lineup, counsel for the suspect and preferably an Assistant United States Attorney. Suffice it to say that the reasons for holding any suggestive

identification procedure should be substantial. The more suggestive the procedure used, the more compelling the reasons must be in order to withstand a claimed violation of due process.

Suggested Criteria Applicable To Claims That An In-Court Identification Is Not Tainted By An Illegal Pre-Trial Confrontation.

The critical analysis here is the extent to which the in-court identification depends upon the illegal pre-trial confrontation. As stated before, the government has the burden to show by "clear and convincing evidence" that there is no causal relationship. United States v. Wade, 388 U.S. 218 240 (1967). The quantum of proof required - clear and convincing - is indeed onerous and speculation on the issue should be precluded by that standard. United States v. Benjamin O'Conner, 282 F.Supp. 963 (D.C.D.C. 1968).

With striking similarity to the due process issue, the determination of this question cannot be made by applying a clear-cut test. However, counsel for appellants again have attempted to compile a thorough, yet not exhaustive, list of criteria applicable to this issue.[4/]

4/ In Wade, the Court said,
Application of this test in the present context requires consideration of various factors; for example, the prior opportunity to observe the alleged criminal

A. Susceptibility of the Witness

Any guage for measuring the susceptibility of the witness would also be relevant to the question of taint. The more highly susceptible the witness, the greater the likelihood that his in-court identification depends heavily upon the illegal identification procedure.

B. Suggestivity of the Illegal Procedure

In order to determine whether the in-court identification is independent of taint, the Court must certainly evaluate the degree of taint which was injected. The stronger the taint, of course, the less likely it is to have left the witness independent and open-minded.

C. Opinion of the Witness

Certainly it would be relevant to ask the witness himself to what extent his in-court identification depends on his illegal confrontation with the suspect. However, the reply which the witness gives cannot be considered

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> act, the existence of any discrepancy between any pre-lineup description and the defendant's actual description, any identification prior to lineup of another person, the identification by picture of the defendant prior to the lineup, failure to identify the defendant on a prior occasion, and the lapse of time between the alleged act and the lineup identification. It is also relevant to consider those facts which despite the absence of counsel, are disclosed concerning the conduct of the lineup.

United States v. Wade, 388 U.S. 218, 241 (1967).

These factors have been incorporated in the list compiled by counsel for appellants.

determinative of the issue. Furthermore, it should be carefully scrutinized and tested against the other relevant evidence before the Court decides to place significant weight on such testimony.

D. Other Pre-Trial Confrontations

In cases where more than one pre-trial confrontation was held, the witness' in-court identification may depend upon a combination of viewings of the suspect or of his photograph. If any of these confrontations are illegal, the burden then shifts to the government to show that an in-court identification is independent of that tainted viewing. See Rath v. Maryland, 240 A.2d 777 (MdCt.Spec.App 1968). Identifications made at the other viewings, together with their attendant circumstances, are relevant to that determination. If the witness had failed to identify the suspect, or if he had identified him during a suggestive procedure, this would tend to negate an independent source for the in-court identification. Conversely, a positive identification under non-suggestive circumstances occurring before the illegal confrontation would tend to show that the in-court identification is not tainted. If during the course of pre-trial confrontations the witness had identified more than one person as being the man who committed the crime, his in-court identification would be highly suspect and probably a product of suggestive procedures.

Effect of Omnibus Crime Control and Safe Streets Act of 1968 Upon Wade, Gilbert and Stovall.

The Omnibus Crime Control and Safe Streets Act of 1968, enacted on June 19, 1968 in no way precludes this Court from finding that in-court identifications of the appellants were inadmissible under Stovall v. Denno, 388 U.S. 293 (1967).[5] In the first place the statute does not purport to have a retroactive effect on trials held before June 19, 1968. Secondly, the statute does not affect claims based upon a denial of due process of law. Finally, Congress has no authority, except by constitutional amendment, to abrogate rights secured by the Constitution.

The statute in the form in which it was enacted[6] does

5/ By its terms, the statute does not affect the admissibility of extra-judicial identification testimony. 18 U.S.C. Section 3502 states in full:

> "The testimony of a witness that he saw the accused commit or participate in the commission of the crime for which the accused is being tried shall be admissible into evidence in a criminal prosecution in any trial court ordained and established under article III of the Constitution of the United States."

6/ An additional portion of the bill relating to eyewitness testimony was eliminated on the Senate floor. 114 Cong.Rec. 56043 (May 21, 1968) (daily ed.). This section would have provided:

> "... neither the Supreme Court nor any inferior appellate court ... shall have jurisdiction to review, reverse, vacate, modify, or disturb in any way a ruling of such a trial court ... admitting in evidence in any criminal prosecution the testimony of a witness that he saw the accused commit or participate in the commission of the crime for which the accused is tried."

If it were held constitutional, this section would appear to

not purport to have a retroactive effect to trials held before June 19, 1968. By familiar rules of construction, a statute will not be construed to have a retroactive effect unless the intention to have such an effect is clear from the statutory language. See e.g. International Brotherhood of Boilermakers v. NLRB, 114 U.S. App. D.C. 372, 316 F.2d 373, 375 (1963).

Even if the court finds that Congress intended the statute to have a retroactive effect, the statute was not intended to and cannot properly be construed to make admissible an in-court identification which is tainted by a pre-trial confrontation conducted in violation of due process. The statute was designed merely to make admissible in-court identifications based upon pre-trial confrontations ruled illegal solely because counsel was not present to represent the suspect. Senator Ervin, the author of this amendment, 7/ stated in debate on this section:

> "On June 12, 1967 -- last year -- 167 years after the provisions of the Constitution relied on; that is, the right of counsel clause, had been placed in the Constitution, the Supreme Court by a majority vote of 5 to 4 held, for the first time in American history, that it was unconstitutional for an eyewitness of a crime to be permitted to look at a suspect in custody

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have denied this court jurisdiction to reverse a ruling of the kind described which had been made in a trial before the effective date of the act.

7/ See. S.Rep. No. 1097, 90th Cong.2d Sess. 29 (1968). Comments of proponents of legislation have long been recognized as relevant in determining Congressional intent. See e.g. Hamm v. City of Rock Hill, 379 U.S. 306, 311 (1964).

> for the purpose of identifying that suspect or exonerating him as the perpetrator of the crime the eyewitness saw committed unless an attorney represent- [sic] the suspect was present.
>
> * * *
>
> Mr. President, I urge the Senate to vote against the motion to strike the first part of this provision [now 18 U.S.C. Section 3502] and thus recognize as a valid constitutional interpretation the meaning assigned to the right of counsel clause of the Sixth Amendment at all times during the 167 years following its becoming a part of the Constitution.

This legislative history makes it clear that the aspect of the Wade decision which Congress found objectionable was the finding that certain pretrial confrontations were a critical stage of the proceedings requiring representation by counsel. Moreover, Congress was clearly seeking to reverse a new legal concept enunciated on June 12, 1967. The arguments in the cases before this court, however, are premised upon the question whether:

> the confrontation conducted ... was so unnecessarily suggestive and conducive to irreparable mistaken identification that he was denied due process of law. This is a recognized ground of attack upon a conviction independent of any right to counsel claim. Palmer v. Peyton, 359 F.2d 199 (C.A. 4th Cir. 1966).

Stovall v. Denno, 388 U.S. 293, 302 (1967) (emphasis supplied).

In any event it is clear that this statute could not constitutionally make evidence admissible which would violate the defendant's right to due process of law. As the Supreme Court recently stated in Miranda v. Arizona, 384 U.S. 436, 491 (1966) "Where rights secured by the Constitution are involved, there can be no rule making or legislation which would abrogate them."

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum has been mailed, postage prepaid, this 29th day of July, 1968 to the U.S. Attorney's Office.

FOY R. DEVINE

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,846
(Crim. No. 246-65)

MALCUS T. CLEMONS, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

GOVERNMENT'S SUPPLEMENTAL MEMORANDUM

ON REHEARING EN BANC

INTRODUCTION

This memorandum is submitted to the Court en banc pursuant to permission of the Court granted in its Order of July 18, 1968. The memorandum deals only with the issues revolving around the identification testimony in the case.

The general legal principles espoused in this memorandum are intended to serve not only as the Government's position in this appeal, but to reflect the Government's viewpoint on considerations common to the other two identification cases which are to be heard en banc contemporaneously with Clemons: Clark v. United States, D. C. Cir. No. 21001 and Hines v. United States, D. C. Cir. No. 21249.

Appellee's original brief was filed before the Wade-Gilbert-Stovall[1/] trilogy of cases was decided and, therefore, appellee's original brief did not detail all facts pertinent to the claims now pressed. For the convenience of the Court en banc, the record facts which appellee believes pertinent follow and are incorporated from appellee's memorandum filed when this case was reheard by the panel.

1/ Wade v. United States, 388 U.S. 218 (1967); Gilbert v. California, 388 U.S. 263 (1967); Stovall v. Denno, 388 U.S. 293 (1967).

APPELLEE'S STATEMENT OF PERTINENT FACTS

In the Clemons case, the circumstances surrounding (a) the photo viewing, (b) the viewing at an unrelated United States Commissioner's hearing, and (c) the cell block identification, were widely explored at trial. Actually, the only pre-trial identification to which an objection of exclusion was raised was the cell block identification (see Tr. 28-34, 220)[2/]. As to the cell block identification, counsel agreed (Tr. 28-34) and stipulated to the surrounding circumstances (Tr. 63-66, 239). While the cell block identification was the basis of the only legal objection raised at trial, the circumstances surrounding the viewing at the United States Commissioner's and the viewing of the photos on the night of the crime were also widely explored at trial[3/] and were strongly argued to the jury as effecting the weight to be accorded the identification of appellant as one of the robbers (Tr. 460-61, 464-80, 492; Tr. 460, 463, 466-68, 492-93, 503).

2/ The objection was on the basis of right to counsel (Tr. 31-A). Compare Smith v. United States, D. C. Cir. No. 20773, decided June 7, 1968 and Wright v. United States, D. C. Cir. No. 20153, decided January 31, 1968, slip op, at 6, with Adams v. United States, D. C. Cir. Nos. 20547-48, decided June 21, 1968, slip op. at 2 n. 1.

3/ In addition to pages cited infra, see also, e.g., Tr. 100, 105, 121, 181-82, 184-85.

(a) Circumstances Surrounding the Photograph Viewing

The subject of the photograph viewing on the night of the crime was first broached by defense counsel (Tr. 43-44, 75) and the record furnishes the following details of what transpired in that vein. Immediately after the robbery, the bus driver drove the bus and passengers to the Ninth Precinct (Tr. 132). The witness Raniecky gave the police at the precinct a description of appellant and was then taken on a tour of the area looking for the robbers (Tr. 74-75). When he returned to the bus, robbery squad detectives had arrived (Tr. 75) and from the victims the detectives obtained a description of appellant (Tr. 39, 172, 178-79, 194, 196).

Within ten to twenty minutes after the robbery, pictures were shown to three of the six witnesses (Tr. 75, 77, 88-89, 99, 101, 155-56, 158). The Robbery Squad detective who responded to the precinct happened to have five pictures with him (154-56)[4/] and all five pictures where shown first to the witness Mr. Raniecky (Tr. 157, 182-83) who was asked if anyone in these five pictures resembled the man that held him up (Tr. 183, 200). Only five pictures were exhibited to the witness because that is all the detective happened to have

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4/ Government Exhibit Nos. 4, 5, 6, 7 and 8 (part of the record on appeal). Government trial counsel originally had no intention of introducing the pictures but did so because of defense counsel's tack (Tr. 167); the pictures were received in evidence after defense counsel stated he had no objection (Tr. 160).

with him; and although these particular pictures were in the detective's possession because the pictures of current robbery suspects were normally carried, Mr. Raniecky was not told this (Tr. 182-83). From the five pictures Raniecky picked that of appellant; his identification was positive (Tr. 73, 157, 172, 183). The officers at the station did not suggest to Raniecky who might have committed the crime (Tr. 75). On the bus at the time of the robbery, Raniecky had looked appellant directly in the face from a distance of about six feet for about a minute before appellant pulled the gun (Tr. 55-56, 78-79). He also testified: " I got a good look at him, so I identified him" (Tr. 72).

After Mr. Raniecky selected the picture of appellant from among the five, the detective began to pass the pictures around with the intention of passing all five of them to the other witnesses; however, two of the witnesses identified the picture of appellant, the first one shown to them, so the detective did not show them the other four (Tr. 184, 172-73, 105, 106, 124-25, 126, 185). When the detective showed the pictures to the witnesses they were separated from each other (Tr. 198, 199). The two persons, other than Raniecky, to whom appellant's picture was displayed identified

him as one of the robbers (Tr. 99, 103, 120-21, 125).[5/] At trial, one of these latter witnesses, Mr. Wilson, was asked about the possibility of having identified appellant because only appellant's picture was shown to him (Tr. 126-27):

> Now, is it possible that the very repetition of being always placed [faced] with the one picture and the one man, might have fixed in your mind, "This is the individual." (Tr. 127.)

Wilson answered:

> No, I remembered the face, appearance. (Tr. 127.)

All of the Government witnesses who had identified appellant by his picture on the night of the crime identified appellant in the courtroom (Tr. 53, 92, 112). Moreover, the witnesses who positively identified appellant were tenacious in their identification (e.g. Tr. 72, 75-76, 101, 124).

5/ Mr. Darby, the bus driver, did not pick out any pictures on the night of the robbery, preferring to see the subject in person (136-37, 195-96). The witnesses Redman and Franklin testified they were not shown the pictures (Tr. 43-44, 88-89; see Tr. 199).

Redman's uncertainty as to identification at trial is discussed infra; Franklin testified appellant looked like the robber but he could not be certain (Tr. 85, 87).

(b) Circumstances Surrounding the Viewing at the Unrelated Commissioner's Hearing

One witness, Mr. Darby (the bus driver), saw appellant at an unrelated hearing before the United States Commissioner on February 11, 1965, several weeks after the crime (Tr. 132-33, 205). (Darby had preferred to identify appellant in person rather than by photograph, see supra note 5.) On February 11th, when the witness arrived at the Commissioner's, appellant was not yet in the hearing room (Tr. 214-15). A detective, who met Mr. Darby at the Commissioner's but did not sit with him, told Darby to sit in the room and observe everyone that came in and out of the hearing room in front of the Commissioner (Tr. 205-206). There were a number of people coming in and out of the room that morning and it was a normal business day. ~~A number of spectators were seated~~ in the room and the officer recalled that criminal cases other than appellant's were heard that morning. (Tr. 206-07, 217). To the best of the detective's recollection, appellant's name was not even called out audibly in connection with his case (Tr. 215). After the hearing, the bus driver positively identified appellant as the man who had robbed him (Tr. 133, 146, 207).[6/]

6/ At one point, the following exchange between defense counsel and the detective occurred:

> Q. *** Mr. Darby ... told you that was Mr. Clemons, that was the man who he thought had committed the offense?
>
> A. Yes. He didn't think. He said positively that was the man. (Tr. 216.)

Mr. Darby, upon whose mind appellant's face was impressed on the night of the crime,[7] positively identified appellant in the courtroom (Tr. 130-31, 132, 146).

(c) Circumstances Surrounding the Cellblock Viewing.

In April 1965, three witnesses went to the cellblock in the basement of the United States Courthouse with a detective and the prosecuting attorney. Appellant was brought to the screen and the prosecutor asked if appellant was the same man. (Tr. 57, 70-71, 78, 94-95, 99-100, 115-17.) Appellant was identified as the robber by the men who viewed him (Tr. 58, 78, 94-95, 117, 121-22). The day before the trial began, another witness was taken to the cellblock by the prosecutor (Tr. 44). He also viewed appellant, but this witness (who also testified he had not looked at the robbers' faces, Tr. 41-45), said he did not know for sure whether appellant was the man (Tr. 47-48). He was also not sure at trial (Tr. 41-42). At trial, counsel agreed and stipulated: that appellant was represented by counsel on the dates of both viewings, that defense counsel was not present on either occasion; and that nothing was said or done on appellant's part beyond the viewing (Tr. 29-34, 64-65, 238-39).

7/ Q. And this was the only impression that you got of this defendant?

A. What do you mean, sir?

Q. I mean a glimpse that you could keep in mind of this person?

A. No, sir, not a glimpse. I looked him straight in the eye when he told me to get it out of there fast or he would put a bullet in my head. (Tr. 148.)

See also Tr. 132, 143, 146-47.

DISCUSSION

Because of the timing of the confrontations involved in this case, the right-to-counsel rules enunciated in Wade and Gilbert are not directly involved in the Clemons appeal (nor in Clark or Hines).[8/] Rather, Clemons' contention has been pressed on "due process" grounds. See, e.g., Simmons v. United States, 390 U.S. 377 (1968); Stovall v. United States, 388 U.S. 293 (1967) (opinion of Brennan, J.); U.S. Const. amend. V.

8/ (Appellant's recognition of this fact can be found in his "Supplemental Memorandum" submitted upon rehearing by the panel, p. 16.) E.g., Stovall v. Denno, 388 U.S. 293 (1967) (Part I of Justice Brennan's opinion, joined in by Warren, C.J., and Clark, J. and concurred in by White, Harlan, and Stewart, JJ.); Wright v. United States, D.C. Cir. No. 20153, decided January 31, 1968, slip op. at 4-5; Borum v. United States, D.C. Cir. No. 20270, slip op. at 4 and cases cited n. 12; Wise v. United States, 127 U.S. App. D.C. 279, 383 F. 2d 206 (1967); Cunningham v. United States, ---U.S. App. D.C.---, 391 F. 2d 457 (1967); Kelly v. United States, D.C. Cir. Nos. 20553-54, decided March 11, 1968, at note 1; see Hemphill v. United States, D. C. Cir. No. 21432, decided June 12, 1968, slip op. at 9.

The frequency with which such claims are being presented to this Court [9/] -- a frequency which, in turn, only minimally reflects the rate of the claim's recurrence in the trial courts -- attests to the fact that the importance of the issue lies not only in its constitutional dimensions, but also in its impact upon the daily administration of justice in the courts and the efficacy of law enforcement. As do Clark and Hines, this appeal brings before the Court en banc for the first time questions involving the ambit of constitutional "due process of law" in this area.

I. DECISION OF THE APPEAL UNDER CASE LAW

By way of anticipatory summary, appellee submits: (A) that under existing case precedent the Court has considerable latitude in defining "due process" in this largely uncharted area; (B) that for a confrontation to be considered violative of "due process" it should be required that the defendant show a confrontation which is truly "shocking" and which violates shared and fundamental concepts of ordered liberty; (C) that the question of whether a defendant has been denied due process of law requires the Court to look to the sum total

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9/ See, e.g., Wright v. United States, D.C. Cir. No. 20153, decided January 31, 1966, slip op. at 3-4 & n. 6.

of the surrounding circumstances, including the whole evidence in the case; and (3) that under the test evolved, the pretrial identifications in this case did not violate due process.

A. Latitude in Defining Due Process Under Present Case Law

To appellee's knowledge, before the Stovall case, and with the exception of the now noteable decision in Palmer v. Peyton, 359 F. 2d 199 (4th Cir. en banc 1966), there was a dearth of cases indicating that a denial of due process could result from a pretrial confrontation and a corresponding lack of cases defining "due process" in the area. Although pronouncements in Stovall have spawned several panel decisions in this jurisdiction[10] (and others) which have etched some of the relevant considerations, the outlines of "due process" as applied here are still sketchy at best. The only Supreme Court opinion on the matter embodying the views of the Court is Simmons v. United States, 390 U.S. 377 (1968).[11]

10/ Remphill v. United States, D.C. Cir. No. 21432, decided June 12, 1968; Smith v. United States, D.C. Cir. No. 20773, decided June 7, 1968; Wright v. United States, D.C. Cir. No. 20153, decided January 31, 1968; Kelly v. United States, D.C. Cir. Nos. 20553-54, decided March 11, 1968; Wise v. United States, D.C. Cir. No. 20259. Some detailed articulation was attempted in United States v. O'Conner, 282 F. Supp. 963 (D.D.C. 1968).

11/ The opinion written by Justice Harlan carried the vote of all participating justices on the "due process" point, except for that of Justice Black who rejected the due process test and believed the issue frivolous.

(The oft-quoted language of "Stovall" is taken from a part of an opinion of Justice Brennan's which carried only two votes in addition to Justice Brennan's: former Justice Clark's and Chief Justice Warren's.[12/] That opinion is not controlling.) Simmons itself is not entirely concrete, although the Court's opinion there does seek to articulate some standard: convictions based on trial identification following pretrial identification will be set aside only if the pretrial identification procedure (there photographic) was "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." (390 U.S. at 384.) Coupled with the way in which the Court thereafter applied that language, Simmons lends guidance, but there still remains

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12/ Justice White's opinion also carried two additional votes (those of Justices Harlan and Stewart); on this aspect of Stovall, these justices would have affirmed because they perceived no constitutional error for the reasons set out in dissent in Wade. Justice Black dissented from Justice Brennan's "due process" formulation and would have reversed on the ground that the Wade principles should be applied retroactively. Justice Douglas would also have held the right-to-counsel principle retroactive in that case. Justice Fortas would have reversed on the ground that the state's reference during the trial to an improper identification violated Fourteenth Amendment rights and was prejudicial.

substantial opportunity and need for this Court to more completely draw the perimeter of "due process" as it applies to pretrial identifications.

B. Nature of the Due Process Test: Definition of Due Process as Involving "Shocking" Conduct.

The delicacy of delineating due process standards has been pointed out with frequency. See generally, Kadish, Methodology and Criteria in Due Process Adjudication: A Survey and Criticism, 66 Yale L.J. 319 (1957). The task is an especially sensitive one since it requires a judge to ignore personal predilections while empathizing with the basic, shared mores of Anglo-American traditions and society as a whole.[13] In the benchmark cases of Palko v. Connecticut, 302 U.S. 319 (1937) (double jeopardy issue), and Rochin v. California, 342 U.S. 165 (1952) (pre-Mapp issue of seizure by stomach-pumping), Justices Cardozo and Frankfurther, speaking for the Court, characterized due process in terms that have become lasting standards. Conduct violative of due process of law is conduct so "shocking that our polity will not endure it";[14] it is conduct which violates

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13/ See Rochin v. California, 342 U.S. 165, 170 (1952).

14/ Palko v. Connecticut, 302 U.S. 319, 328 (1937).

"fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." 15/ "Due process of law is a summarized constitutional guarantee of respect for those personal immunities which ... are 'so rooted in the traditions and conscience of our people as to be ranked as fundamental' ... or are 'implicit in the concept of ordered liberty' ...." 16/ The conduct found to be constitutionally reprehensible in Rochin was said to be conduct that was "bound to offend even hardened sensibilities", conduct such that it "shocks the conscience" 17/ The seed-case of Palmer v. Peyton, 359 F.2d 199 (4th Cir. en banc 1966), relies on similar concepts, citing Rochin and finding a violation of "'those canons of decency and fairness' established as part of the fundamental law of the land." 18/

15/ Ibid.

16/ Rochin v. California, 342 U.S. 165, 169 (1952).

17/ Id. at 172.

18/ 359 F.2d at 202. (Footnote omitted.) The Court's quote is from Malinski v. New York, 324 U.S. 401, 416-17 (1945).

Wise v. United States, 127 U.S. App. D.C. 279, 283, 383 F.2d 206, 210 (1967), looked to the "rudiments of fair play that govern the due balance of pertinent interests".

It is against these precepts that any due process test in this area should be formulated. Appellee submits that the "shocking" test should be deemed implicit in all due process tests and may be considered discernible in the Supreme Court's language in Simmons.19/

This view of the due process clause as(requiring extremesituations before identification suppression is appropriate on due process grounds)is consistent with the focus of the courts in several cases. That is, in several significant cases the courts have focused intensely on the

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19/ The Court's language in Simmons is directed to identification procedures "impermissibly suggestive". (390 U.S. at 384.) (Emphasis added.) The term "impermissibly" connotes value judgments and can be said to incorporate values such as those embodied in Rochin and Palko. The Court's choice of the word "impermissibly" in Simmons is in marked contrast with the term "unnecessarily" (suggestive) used in Justice Brennan's opinion in Stovall (388 U.S. at 302). "Impermissible" conduct would be more difficult to establish than merely "unnecessary" conduct.

bona fide nature vel non of the police conduct, in spite of suggestibility believed inherent. For example, in the circumstances which several members of the Supreme Court felt suggestive in Stovall, the focus was placed ostensibly on the necessity for the hospital room identification. Even Justice Brennan's opinion found necessity there and approved affirmance. But more than that must have been involved; if it was only the necessity involved -- and no feeling of underlying good-faith permissible police action -- affirmance would not have been the proper course. At trial the state had relied on testimony concerning the pretrial hospital room identification, as well as the in-court identification. But the necessity for the hospital room confrontation had passed, the victim had recovered and testified at trial. The Court could have limited the state to the in-court identification since the necessity for the pretrial identification had passed. More pointed is the tone of the opinion of the court of appeals in Palmer v. Peyton, supra, where the victim did not even see at the pretrial procedure the man she identified. A reading of that opinion leaves a clear impression that the court believed the police acted not only unnecessarily, but with an attitude amounting to a deliberate or reckless quest for the conviction of one man to the exclusion of at least one other reasonable suspect. Likewise, this focus

on affirmative and offensive police behavior is seen in People v. Podercine, 63 Cal. Rptr. 873 (Calif. Ct. App. 1967) where the court found a due process violation in a case involving photograph identification. The defendant had an extremely masculine face and her picture was shown with a group of photos of very feminine women. The court came to the conclusion that the selection of the photographs was purposeful on the part of the police and was "rigged". See also People v. Smith, 66 Cal. Rptr. 551, 554 (Calif. Ct. App. 1968), where the court noted that under the concept of due process a deliberate "pervicacious use" of photographs calculated to "nail down" an identification later to be used in court has been condemned; in Smith the court found no evidence that the photos were used to "prime" the witness; Hemphill v. United States, D.C.Cir. No. 21432, decided June 12, 1968, slip op. at 9, where the Court emphasized that the "confrontations were not planned by the police".

This view of due process as focusing upon some shocking police action also accords with the function served by the due process exclusionary concept in this area. Traditionally, the sweeping rule was that the manner of extra-judicial identification effected only the

weight, not the admissibility, of identification testimony at trial.[20] The Supreme Court has now affirmed the existence of a niche in this rule for those cases where the defendant can show a due process violation. But cases of alleged suggestibility in identification procedures still retain the built-in safety valve whereby the defendant can probe suggestibility and argue weight to the jury. And the more extreme and apparent the suggestibility, the more the jury can be expected to recognize, and compensate for, that suggestibility.[21] Twelve lay jurors representing the community are surely as apt at determining that question of fact, as fact, as are judges when they determine that basically factual question as a matter of law.

20/ See, e.g., Simmons v. United States, 390 U.S. 377, 382 (1968).

21/ The danger that use of the [photograph showing] technique may result in convictions based on misidentification may be substantially lessened by a course of cross-examination at trial which exposes to the jury the method's potential for error.

Simmons v. United States, 390 U.S. 377, 384 (1968).

Thus there is built-in compensation for the suggestibility factor. The "due process" concept in this area does cover a facet not otherwise compensated for by the "weight" rule, if the due process test focuses on deliberate police inflation of a witness's ability to identify. Only by a legal, due process court ruling can the nature of the police conduct be considered; jurors deciding guilt or innocence on the evidence are unlikely to focus on the protection of fundamental principles of fairness vis-a-vis police behavior.

To make explicit what is implicit in the argument above and in the cases finding no due process violations, we submit that viewing the subject singly (the so-called "one-to-one" confrontation) is not enough to establish a due process violation.[22/] Something additional is needed.

22/ See also Justice Douglas' explicit statement to this effect in his dissenting opinion in Biggers v. Tennessee, 390 U.S. 404, 408 (1968):

> Of course, due process is not always violated when the police fail to assemble a line-up but conduct a one-man showup.

Indeed, the most vivid example of a one-to-one confrontation is the in-court identification of a defendant by a witness called to testify before the jury in the case against the defendant. Surely, no one would contend that procedure violates due process. Yet it would seem to be the identification most remote in time from the crime, most "suggestive" in terms of selection and who is to be identified, most "suggestive" in terms of the witness thinking the government believes it has the right man, and most "coercive" in terms of the witness feeling he is expected to identify.

Appellee submits that that additional factor is conduct which is "impermissibly suggestive" --- conduct which is truly shocking.[23/]

Moreover, such conduct must "give rise to a very substantial likelihood of irreparable misidentification"[24/] (see infra, pp. 20-21). That question, whether such a likelihood occurred, must be evaluated on the totality of the circumstances. E.g., Simmons v. United States, supra.

23/ As evidence of the shared values of our society on identification procedures, appellee submits that the overwhelming votes in favor of Title II of P.L. 90-351, 82 Stat. 211, [see, e.g., 114 Cong.Rec. S6042 (daily ed. 5/21/68); 114 Cong.Rec. H4655 (daily ed. 6/6/68)], are indicative that our society does not find single confrontations offensive. Our point here is not reliance on the per se rule of the statute, but merely use of the vote by elected representatives of the people as constituting some evidence of whether or not such confrontations shock the "traditions and conscience of our people". Cf. Kadish, Methodology and Criteria in Due Process Adjudication--A Survey and Criticism, 66 Yale L.J. 319, 330-32 (1957).

24/ Simmons v. United States, 390 U.S. 377, 384 (1968).

C. Scope of the "Very Substantial Likelihood" Inquiry: Totality of Circumstances as Looking to All the Evidence.

Simmons and other cases have said that due process claims in this area are to be assessed against the totality of the circumstances. Some of the case language might indicate that the "circumstances" to be investigated are solely those surrounding the pretrial line-up,[25] but in practice the courts have looked to the whole record and the entire evidence in determining whether impermissible suggestiveness gave rise to a "very substantial likelihood of irreparable misidentification."[26] Appellee submits that

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25/ E.g., "surrounding circumstances" (Simmons, 390 U.S. at 383); "totality of circumstances surrounding it" [confrontation?] (Stovall, opinion of Justice Brennan, 388 U.S. at 302); "circumstances of the confrontation" (Wise, 127 U.S. App. D.C. at 282, 383 F.2d at 209).

26/ E.g., Simmons v. United States, 390 U.S. at 385-86, where the court took into consideration identifications made subsequent to the one challenged, as well as firmness of the witnesses on cross examination at trial, concluded that taken together the circumstances left little room for doubt that the identification was correct, and refused to find a due process violation in "the factual surroundings of the case"; Hanks v. United States, 388 F.2d 171 (10th Cir. 1968), where handwriting on stolen money orders was established to be the defendant's; People v. Harris, 236 N.E.2d 281 (Ill. App. Ct. 1968), where court noted evidence of gun found on defendant and his flight, and stated guilt did not depend on identification by witness; Commonwealth v. Bumpus, 3 Cr.L.Rptr. 3207 (Mass. 1968), where the court pointed out, in a housebreaking case, that the defendant was found with a screwdriver and with a flashlight identified as having been stolen from the house.

although particular emphasis should be placed on the circumstances surrounding the pretrial identification itself, the decision as to whether there is "a very substantial likelihood of irreparable misidentification" must necessarily look to the whole evidence in the case. Such a review seems especially appropriate when the ultimate inquiry is whether or not the defendant has been denied liberty without due process of law. Finally, that scope of inquiry (one looking to the whole evidence) is particularly appropriate at the appellate level. Cf. Fed. R. Crim. P. 52(a). To the extent that other evidence corroborates the identifications the "substantial likelihood" of misidentification may be deemed reduced.

D. Application of the Tests Discussed above to This Case

Applying the above tests to the facts of this appeal, appellee submits there was no denial of due process. Factors which the courts have considered in assessing the likelihood of misidentification are interwoven in this discussion and not separately enumerated in a separate part. Although appellee believes that the due process question must be viewed on the record as a whole, it is convenient to focus initially on the circumstances surrounding each of the challenged pretrial identifications.

1. The Photographic Identification: Three of the six witnesses to the robbery identified appellant by photograph. This identification occurred within 10 to 20 minutes of the crime, at a time when it might be expected that impressions of the robbers were still fresh in the witness minds.[27] The witnesses were separated when shown the pictures, thereby reducing the influence of one identifier on another.[28] Photographs of five different persons (before this Court) were shown to the first witness, a reasonable number.[29] More than one photograph of Clemons did not appear.[30] Although two of those who identified Clemons from pictures

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27/ On considering the time between crime and identification as an obviously relevant consideration affecting suggestibility and misidentification, see, e.g., Wise v. United States, 127 U.S. App. D.C. 279, 383 F.2d 206 (1967).

28/ On separation of witnesses as relevant, see Simmons v. United States, 390 U.S. 377, 385 (1968); United States v. O'Connor, 282 F. Supp. 963, 965 (D.D.C. 1968) ("mutual reinforcement of opinion among witnesses simultaneously viewing").

29/ As to the number of photographs as relevant, see Simmons v. United States, 390 U.S. 377, 383, 385 n. 6 (1968); Smith v. United States, D.C.Cir. No. 20773, decided June 7, 1968, slip op. at 2 n. 1. See also Kelly v. United States, D.C.Cir. Nos. 20553-54, decided March 11, 1968.

30/ Compare Simmons v. United States, 390 U.S. 377, 385, 386 n. 6 (1968).
(More than one photograph of Clemons is before this Court, however.)

on the night of the robbery saw only the picture of Clemons before identifying him,[31] this was not the result of deliberate police action intended to artificially create prompt identification of a particular suspect.[32] The identifying witnesses made positive, not wavering, identifications of Clemons and were not shaken in that position during trial.[33] The record indicates that witnesses had given the police a description of Clemons prior to identifying the photograph, that there was sufficient opportunity to observe, that the conditions for observation were good, and that there was an impression cast upon the witnesses at the time of the robbery itself.[34] There was a clear necessity

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31/ As discussed above in the statement of facts, the detective began to pass the pictures around with the intention of passing all five of them to these witnesses; but these two witnesses identified the picture of Clemons, the first one shown, and the other four pictures were therefore not passed to them.

32/ Compare People v. Pedercino, discussed supra p.16 ; see People v. Smith, discussed supra p.16.

33/ As to the relevance of the witness's tenacity of identification, see Simmons v. United States, 390 U.S. 377, 385 (1968). See also Crume v. Beto, 383 F.2d 36 (5th Cir. 1967).

34/ On the circumstances surrounding the crime and the opportunity to observe as they relate to likelihood of misidentification, see, e.g., United States v. Marson, 3 Cr.L.Rptr. 2279 (4th Cir. 1968); Banks v. United States, 388 F.2d 171 (10th Cir. 1968); United States v. O'Connor, 282 F.Supp. 963, 965 (D.D.C. 1968) (point 10); People v. Lewis, 236 N.E.2d 417 (App.Ct.Ill. 1968); State v. Matlack, 49 N.J. 491, 231 A.2d 369, cert. denied, 389 U.S. 1009 (1967); State v. Hill, 413 S.W.2d 46 (Mo. 1967). With the facts of this appeal, compare People v. Ballott, 20 N.Y.2d 600,--- N.E.2d---, 285 N.Y.S.2d 1 (1967)(non-photographic confrontation).

for attempting identification by use of photographs; the case was in a purely investigatory state and the perpetrators were still at large.[35] The need for and desirability of prompt identification attempts is patent and to be encouraged.[36] Nor was there anything suggestive said or done by the police to improperly single out and encourage identification of appellant.[37] The police did not tell the viewing witnesses why they had Clemons' picture with them that night.

35/ See Simmons v. United States, 390 U.S. 377, 384-85 (1968).

On justification and necessity as bearing on impermissible identification procedure, see, e.g., Simmons v. United States, 390 U.S. 377, 385 (1968); Smith v. United States, D.C.Cir. No. 20773, decided June 7, 1968, slip op. at 2 n. 1; Stovall v. Denno, 388 U.S. 293, 302 (1967).

36/ Cf. Wise v. United States, 127 U.S.App.D.C. 279, 383 F.2d 206 (1967); Commonwealth v. Burgos, 3 Cr.L.Rptr. 3207 (Mass 1968); State v. Keeney, 425 S.W.2d 85 (Mo. 1968); People v. Rodriquez, 288 N.Y.S.2d 853 (App.Div. 1968).

37/ The witnesses were asked to "look through ... [the photos] and see if there is anyone who resembles the man who held you up" (Tr. 200). The police did not suggest who they thought might have committed the crime. (Tr. 75). See, e.g., Simmons v. United States, 390 U.S. 377, 385 (1968); Smith v. United States, D.C.Cir. No. 20773, decided June 7, 1968, slip op. at 2 n. 1. With the facts of this appeal, compare People v. Pedercino, discussed supra p. 16; People v. Slutts, 66 Cal. Rptr. 862 (Calif. Ct. App. 1968).

Not only is there here a lack of suggestibility raising a "very substantial likelihood" of misidentification on these facts, but more important is the complete absence of any shocking police conduct affronting basic sensibilities.

2. The Identification at the Unrelated Preliminary Hearing: One witness, bus driver Darby, identified appellant Clemons during a morning at the Commissioner's, where appellant appeared for an unrelated hearing (described supra, p. 6). Darby had not viewed the pictures shown to other witnesses on the night of the robbery.[38] On that night appellant's face had been impressed on Darby's mind. He immediately gave the police a description and his view of Clemons was made only three weeks after the crime. At the time, there were numerous possibilities for comparison at the viewing because the room was crowded and the normal business of the hearings brought many persons into the room. Darby's identification was positive. The record shows nothing inherent which would have emphasized Clemons over others. Nor was there any prompting or suggestiveness on the part of the police. Still less is there any semblance of impermissible conduct which can be characterized as shocking. Indeed, the manner in which Clemons was

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38/ Compare Fogg v. Commonwealth, 208 Va. 541, 159 S.E.2d 615 (1968).

identified by Darby was far less suggestive than the normal courtroom identification at trial or preliminary hearing.

3. The Cellblock Confrontations: Several of the witnesses viewed appellant Clemons in the Courthouse cellblock.[39] Apparently, at least three witnesses viewed appellant in April;[40] one later viewed him in October. The circumstances of these confrontations are set out above. Appellee notes again the opportunity to observe appellant which the witnesses had at the time of the robbery. The robber was on the bus a substantial amount of time, the bus was well-lighted, and the distance between the witnesses was very short. Previously the witnesses were able to give a description of appellant to the police before the cellblock identification. Three months passed between the time of the crime and the April cellblock confrontation by those who then identified Clemons. Three of the witnesses

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39/ It is not clear whether all of the witnesses viewed appellant in the cellblock.

40/ The record does not establish the proximity of one witness to another at the time of this viewing.

had identified Clemons from photographs on the night of the crime.[41] Again the absence of any indefiniteness on the part of witnesses bears emphasis. As to the confrontations themselves, one of the witnesses at the April confrontation testified that he was asked simply "if it was the same man". Although appellant was viewed singly, there is nothing to indicate that there was injected any offensive prompting or other attempt to inflate the witness' ability to identify. Indicative of the lack of affirmative suggestion on the part of the government is the fact that the witness Redman stated he was not sure of identification, that he could not identify appellant.[42] There was no shocking conduct and nothing more suggestive than exists in an in-court trial identification.

Conclusion as to Part D: Several additional and mutual factors deserve cognizance in connection with the considerations discussed above. One such consideration is

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41/ Cf. Simmons v. United States, 390 U.S. 377, 385 (1968) (looking to subsequent identification on issue of likelihood of misidentification).

42/ Redman was concentrating on the robber's gun, not the robbers' faces (Tr. 41, 45).

that in assessing whether there is a very substantial likelihood of misidentification the number of witnesses identifying appellant is significant.[43] Here four witnesses positively identified Clemons as one of the robbers; a fifth was unsure but said appellant "sort of" looked like the man (Tr. 87). Again the tenacity of the witness' identification bears emphasis.[44] Not only the number of witnesses is important; equally important is the distinct patterns of their pretrial identification. For example, the witness Darby did not try to identify Clemons from pictures on the night of the robbery; he first saw Clemons at the Commissioner's office. Those who saw Clemons in the photos did not see him at the Commissioner's.

43/. See, e.g., Simmons v. United States, 390 U.S. 377, 385 (1968).

44/ E.g., Tr. 75-76, 79, 101, 124, 146. Noteable, too, is this question and answer of one of the witnesses:

> Q. How is it possible that the very repetition of being always placed [faced?] with the one picture and one man, might have fixed in your mind, 'This is the individual.'
>
> A. No, I remembered the face, appearance. (Tr. 127.)

Not all of the witnesses saw the photos. Such configuration has been said to increase reliability of identification.[45]

In assessing on this record whether or not appellant has been denied due process of law, it is also highly pertinent that the defense was allotted full opportunity to explore before the jury and at great length the circumstances of the pretrial identifications. Extensive cross-examination was permitted and the summation dwelled on this aspect of the case. Furthermore, the jury had before it the pictures shown to the witnesses on the night of the crime and the fairness of the selection could be seen. There seemed to be no inability on the part of counsel in reconstructing the pretrial identifications and the defendant in his own testimony also testified about the cellblock identifications.

It is not insignificant that this Court has affirmed countless convictions involving identifications made in

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45/ Simmons v. United States, 390 U.S. 377, 386 n. 6 (1968).

non-lineup situations.[46/] The facts shown in this case simply are not shocking to the conscience. Indeed, when this appeal was originally argued and decided, it was affirmed unanimously. Apparently no judge of the panel then found the facts, shown by the record and argued by appellant, to be shocking.

We submit that appellant has not met his burden of showing a lack of due process, of proving that he was deprived of liberty by action which shocks the conscience and offends hardened sensibilities. The facts of this record, we submit, do not approach such classification.

46/ E.g., Kennedy v. United States, 122 U.S.App.D.C. 291, 353 F.2d 462 (1965); Copeland v. United States, 120 U.S.APP. D.C. 5, 343 F.2d 287 (1964).

See also Smith v. United States, 117 U.S.App.D.C. 1, 324 F.2d 879 (1963) (D.C.Cir. No. 17466), rehearing en banc denied, November 18, 1963, cert. denied, 377 U.S. 654 (1964), discussed in Appellee's Supplemental Memorandum filed on rehearing by the panel, pp. 8-9.

II. POSSIBLE EFFECT OF RECENT STATUTORY LAW, "THE OMNIBUS CRIME CONTROL AND SAFE STREETS ACT OF 1968"

If on this appeal (or the companion cases), this Court were to determine that under case law a due process violation existed and an in-court identification was inadmissible, there would arise the question of the applicability of the "Omnibus Crime Control and Safe Streets Act of 1968".[47/] Such consideration would require threshold questions concerning the application of the statute to a case on appeal.[48/] Furthermore, consideration of the statute would require canvassing complex issues involving the federal courts, the legislative function, and other constitutional questions. Because appellee believes there is no due process violation, it also believes the

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47/ Act of June 19, 1968, P.L. 90-351, 82 Stat. 197, 211, 18 U.S.C. § 3502:

> Section 3502. Admissibility of evidence of eyewitness testimony. The testimony of a witness that he saw the accused commit or participate in the commission of the crime for which the accused is being tried shall be admissible in evidence in a criminal prosecution in any trial court ordained and established under article III of the Constitution of the United States.

48/ Cf. Brief for Appellee in Frazier & Bryson v. United States, D.C.Cir. Nos. 21425-27, pp. 17-18.

applicability of the statute need not be necessarily reached. For that reason, and because appellee believes that the short time allowed for filing supplemental memoranda does not indicate that the Court wished these complicated issues briefed, this memorandum does not purport to treat those questions. However, because of the importance of the statute and the nature of the issues involved, should the Court reach any question relating to the statute's application appellee would respectfully request opportunity to fully brief and argue the questions involved.

CONCLUSION

WHEREFORE, for the reasons set out above appellee respectfully submits that there is no error relating to the identification issues in the case. Because appellee believes there is no other error in the case, we respectfully submit that the judgment of the court should be affirmed.

/s/ David G. Bress
DAVID G. BRESS
United States Attorney

/s/ Frank Q. Nebeker
FRANK Q. NEBEKER
Assistant United States Attorney

/s/ James A. Strazzella
JAMES A. STRAZZELLA
Assistant United States Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Memorandum on Rehearing En Banc has been mailed to attorneys for appellant Clemons--William W. Greenhalgh, Esq., and Foy R. Devine, Esq., 424 Fifth Street, NW., Washington, D.C. 20001--this 29th day of July, 1968.

I FURTHER CERTIFY that a copy of the foregoing has been mailed to co-counsel for appellant in Hines v. United States, No. 21,249--Lawrence D. Holloman, Esq., and Sherwood B. Smith, Jr., Esq., 710 Ring Building, 1200 18th Street, NW., Washington, D.C. 20036--and to co-counsel for appellant in Clark v. United States, No. 21,001--John Perazich, Esq., 424 Fifth Street, NW., Washington, D.C. 20001, this 29th day of July, 1968.

/s/ James A. Strazzella
JAMES A. STRAZZELLA
Assistant United States Attorney

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,846

MALCUS T. CLEMONS, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

---

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
DONALD S. SMITH,
CAROL GARFIEL,
Assistant United States Attorneys.

Cr. No. 246-65

QUESTIONS PRESENTED

1) Was appellant entitled to a preliminary hearing on a Grand Jury Original, especially where he failed to request such a hearing prior to trial and was fully aware of the identity of the Government witnesses and of the manner in which he had been identified by them?

2) Was appellant's right to the assistance of counsel infringed merely because certain Government witnesses viewed him in the cellblock after indictment and in the absence of his counsel, where nothing was said to or by appellant at that time?

3) Did the trial court properly permit three victims of crime to testify that appellant had robbed and assaulted them although the witnesses had seen appellant after the crime in the cellblock and not in a lineup?

4) Did the trial court properly exclude evidence that a person totally unconnected with any of the crimes charged in the indictment had erroneously identified appellant as the person who had robbed him two months before the instant crimes?

INDEX

TABLE OF CASES

OTHER REFERENCES

* Cases chiefly relied upon are marked by asterisks.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,846

MALCUS T. CLEMONS, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

By indictment filed March 8, 1965, appellant was charged with four counts of robbery (22 D.C. Code § 2901) and four counts of assault with a dangerous weapon (22 D.C. Code § 502), all counts arising out of one incident. Appellant was tried before Judge Leonard P. Walsh and a jury in October, 1965, and found guilty as charged. He received a general sentence of four to twelve years' imprisonment and has appealed.

At about 3:50 a.m. on January 18, 1965, William Darby brought his D.C. Transit bus to a stop at the corner of 8th and D Streets, Northeast, in order to pick

up two persons who were standing at the bus stop. As the men boarded the bus, one handed Mr. Darby a dollar. He received four quarters in change and placed two quarters in the fare box. Suddenly both newcomers drew revolvers. The one who had paid the fares held a gun to Mr. Darby's head and ordered him not to move the bus. He then searched the driver's pockets, finding $13.00 of the victim's personal property, and seized the change carrier and about $30.00 of the bus company's money. The other robber, appellant, his gun drawn, proceeded through the bus, obtaining at gunpoint $23.00 from Dmytro Raniecky, $13.00 from David Charles, and $1.85 from Barbiel Wilson. His tour of the bus successfully completed, appellant returned to the front and exited with his accomplice. As they reached the sidewalk, appellant paused, looked back at Mr. Darby, and said, "Get the bus out of here fast, or I'll put a bullet through your head." As the bus pulled away, the victims heard two shots ring out. (Tr. 38-43, 45-46, 49-57, 72, 89-93, 95, 98, 110-17, 120, 128-33, 140-43, 146-48.)

Mr. Darby drove directly to the Ninth Precinct, a few blocks from the robbery scene, and reported the crime (Tr. 43, 59-60, 88, 95, 116, 132). Mr. Raniecky toured the neighborhood with two officers in a scout car but the robbers were nowhere in sight (Tr. 74-75). Back at the station house, within half an hour of the holdup, the victims were shown pictures of five men, one of which was of appellant Clemons. Then and again at trial, Mr. Raniecky, Mr. Charles, and Mr. Wilson positively identified appellant as one of the robbers. (Tr. 53-54, 75-78, 81, 91-92, 99-103, 106-07, 112-13, 120-21).[1] Mr. Darby did not make a positive identification of appellant from

[1] Samuel Redman and Joseph Franklin were also passengers on the ill-fated bus but had lost no money in the robbery. (Franklin thwarted the robbers by sitting on his.) Neither could positively identify appellant, although Franklin testified that appellant looked like the man who had robbed his fellow passengers. (Tr. 40-42, 82-87, 89.) Redman had viewed appellant in the cell block the day before the trial began but had been unable to recognize him (Tr. 44, 47-48).

the pictures on the night of the robbery, for he was too busy answering questions from all sides and trying to ascertain precisely how much money had been stolen (Tr. 136-37). Indeed, he told Detective Sergeant Sherwood Herring that he would rather *not* see the pictures for they might confuse him; he preferred to see the robber first in person (Tr. 196). Mr. Darby did see appellant in person on February 11, at the office of the United States Commissioner, and then, as at trial, he identified appellant as one of the robbers (Tr. 130-33, 145-46, 205-08, 215-17). In addition, Messrs. Raniecky, Charles, and Wilson had seen appellant in the cell block of the courthouse in April and had then identified him as their assailant (Tr. 57-58, 71-73, 79, 94-95, 116-17, 236-37).

The witnesses were agreed that during the crime appellant had worn a brown sweater or shirt (Tr. 69, 75, 82-86, 97, 100-01, 117, 140). Moreover, although he appeared at trial clean-shaven, the victims were in accord that in January appellant had worn a small mustache, which also appeared in the picture they had identified (Tr. 69, 78, 102-04, 123, 125).

Appellant presented an alibi defense by his own testimony and that of his good friend, Fred Douglas Harrell, a convicted felon and misdemeanant (Tr. 283, 299, 320-24). Their story was that in January of 1965 appellant had been living with one James Brown at 2413-18th Street, N.W. and that he had been at that apartment on the night of the robbery. At about 10 p.m., Harrell arrived; Brown left shortly thereafter for work. Appellant and Harrell spent the next five hours playing cards and records and listening to the radio. At 3 or 3:15 a.m. one Mable Stewart, with whom appellant claimed to have lived for a short time during December and January, arrived. At about 4 a.m., appellant, Harrell, and Miss Stewart left the apartment and proceeded to the corner of 18th Street and Columbia Road, where the men saw Miss Stewart into a cab on her way home. The two friends then proceeded to Harrell's home, where appellant remained until noontime of that day. Appellant

denied having committed the crimes charged and admitted to prior convictions for assault and threats. (Tr. 230-34, 244-45, 249, 256-58, 263-64, 278-81, 290-96, 298-99, 302-03, 309-14.) Appellant did not present the testimony of Miss Stewart or of any of his other friends whom he claimed to have seen on January 17-18, 1965 (Tr. 231, 254-56, 259, 308-12).

Although the victims of the robberies testified that they observed nothing unusual about the gun hand of the bandit who came down the aisle of the bus (Tr. 45, 69, 98-99, 120), appellant claimed that on the night of the robbery he was wearing a bandage on his right hand, having recently suffered an infected finger that required hospitalization from January 9-13. The records of D.C. General Hospital bore out his claim that he had in fact received treatment for an infection on those dates, but although appellant was directed to return for further care, the records reflected no subsequent visit by appellant to the clinic. (Tr. 227-30, 243-44, 264, 270-76, 286-88, 293-94, 308, 372-77.)

In rebuttal, the Government called Miss Mable Stewart, who contradicted the testimony of appellant and Harrell. She said that she had never been to appellant's apartment at 2413 - 18th Street, N.W., that she had not seen him on the night of January 17-18, 1965, and that she had never gone to the corner of 18th Street and Columbia Road with appellant and Harrell to find a taxicab. Moreover, although appellant had claimed that he had lived with Miss Stewart on Euclid Street until January 9, 1965 (Tr. 245, 333), she testified that she did not see him during the first week of January and that she had been living at that time at 1320 Corcoran Street with her brother. Miss Stewart said she had seen appellant on the night of January 2 in a restaurant and that the next time she had seen him was about three weeks later, at 1324 Columbia Road, where appellant and another man engaged in a violent fight. (Tr. 406-28, 446.)

STATUTES INVOLVED

Title 22, District of Columbia Code, Section 502, provides:

> Every person convicted of an assault with intent to commit mayhem, or of an assault with a dangerous weapon, shall be sentenced to imprisonment for not more than ten years.

Title 22, District of Columbia Code, Section 2901, provides:

> Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than six months nor more than fifteen years.

SUMMARY OF ARGUMENT

I

Appellant was not arrested for the crimes of which he stands convicted until after the return of the indictment in this case. Accordingly, he was not entitled to a preliminary hearing on these charges. Moreover, neither of his trial counsel ever asked that a preliminary hearing be held and the record itself demonstrates that counsel were fully aware of who the Government's witnesses were and how they had identified appellant. Appellant's claim of prejudice is totally unfounded.

II

No case has yet held that a prisoner has a right to have the aid of counsel when he is observed by Government witnesses in a cellblock. Nothing was said to or by appellant when certain witnesses looked at him in the cellblock prior to trial. Thus the trial judge properly re-

fused to dismiss the indictment and permitted these witnesses to testify.

III

The manner in which a defendant is identified goes to the weight of the identification, not to its constitutionality or admissibility. Nor can a prisoner, with or without the assistance of counsel, in custody or on bond, manipulate the circumstances under which he is observed by witnesses to the crime.

IV

Evidence that a person who had been robbed two months before the instant crimes had wrongly identified appellant was properly excluded as totally irrelevant to the question whether appellant had robbed and assaulted four other people.

ARGUMENT

I. Appellant was not entitled to a preliminary hearing, never requested such a hearing, and was not prejudiced by lack of one.

(Tr. 40-42, 82-87, 89, 107, 167-68, 186, 265, 280-81, 391)

On February 4, 1965, appellant was arrested for being drunk in the house of his friend and witness Harrell (Tr. 186, 265, see Tr. 391). Later that day, he was rearrested on an outstanding warrant charging him with robbery of one DeMarco (Tr. 391).[2] Appellant was not

[2] Appellee does not understand appellant to urge that he should have been indicted for the robbery of DeMarco instead of or in addition to the crimes charged in this case. It is well recognized that the decision whether to present a case to a grand jury lies in the sole discretion of the executive branch of the Government. *E.g.*, *Hutcherson* v. *United States*, 120 U.S. App. D.C. 274, 277, 345 F.2d 964, 967 (1965); *United States* v. *Cox*, 342 F.2d 167, 171 (1965), *cert. denied*, 381 U.S. 935 (1966); *Deutsch* v. *Aderhold*, 80 F.2d 677 (5th Cir. 1935). The subsequent proceedings in the DeMarco case, copies of which are appended to appellant's brief, are not

arrested for the crimes of which he stands convicted until the return of the indictment on March 8, 1965; the indictment on its face reflects that it was a Grand Jury Original. In these circumstances, appellant was not entitled to a preliminary hearing on the instant charges. *Godfrey* v. *United States*, —— U.S. App. D.C. ——, 358 F.2d 456 (1965); *Crump* v. *Anderson*, —— U.S. App. D.C. ——, 352 F.2d 649 (1965). Rule 5 of the Federal Rules of Criminal Procedure simply has no application to a case such as this.

Moreover, appellant's trial occurred one year after the decision in *Blue* v. *United States*, 119 U.S. App. D.C. 315, 342 F.2d 894 (1964), *cert. denied*, 380 U.S. 944 (1965). Despite the clear mandate of *Blue* that relief[3] be sought prior to trial, neither of appellant's trial counsel ever asked that a preliminary hearing be held in this case. Accordingly, appellant's present claim, utterly devoid of merit, is in addition untimely. *Stith* v. *United States*, D.C. Cir. No. 19520, decided April 22, 1966; *Hairston* v. *United States*, D.C. Cir. No. 19594, decided March 31, 1966.

Although appellate counsel purports to find some prejudice to appellant from the lack of a preliminary hearing, his attempt fails dismally. He claims that trial counsel did not know who the Government's witnesses would be, did not know how the witnesses had identified appellant, and developed testimony about the picture identification of appellant only because he had been unaware of the means of identification. The face of the record itself disproves these claims. First, this was not a capital case; accordingly appellant was not entitled to learn before trial who the Government would call to testify. *Cf.* 18 U.S.C. § 3432. However, he could reason-

properly part of the record on appeal. These documents are, however, records which this Court could judicially notice and accordingly appellee will refrain from moving to strike them from appellant's brief. Appellee emphasizes, though, that these proceedings were never called to the attention of the trial court in the instant case.

[3] There, of course, from a defective waiver of a Rule 5 hearing.

ably expect that the four persons named in the indictment as victims would be witnesses for the Government, and counsel were free to interview them at their leisure. Of the other four Government witnesses in chief, two did not identify appellant (Tr. 40-42, 82-87, 89), and two were investigating police officers whose testimony was cumulative to that of the eyewitnesses. In any event, the court record contains a copy of the list of witnesses subpoened by the Government for trial on April 26, 1965; this list was available to defense counsel long before the case actually was tried in October.

Second, trial counsel obviously knew that several of the Government witnesses had identified appellant from a photograph shortly after the crimes, for on July 21, 1965 and again on September 30, 1965, counsel moved under Fed. R. Crim. P. 17(b) for the issuance of a subpoena to the police department for

> all photographs of the defendant in the files of the Metropolitan Police Department shown to the government witnesses on January 18, 1965, and used in the identification of the defendant.

Upon counsel's representations that appellant required these photographs to support his claim "that the charges against him are based on a case of mistaken identity", these motions were granted. Appellant's claim of ignorance is spurious.[4]

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[4] Appellant concedes (Br. 21) that his picture formed no part of the Government's case until its existence was shown on cross-examination (Tr. 167-68). When that photograph was offered in evidence, his only objection was that the other photographs shown to Mr. Raniecky should have been offered too (Tr. 107). This Court's recent decision in *Barnes* v. *United States*, D.C. Cir. No. 19313, decided May 3, 1966, is, of course, inapplicable, for here the appellant took the stand and admitted his prior criminal involvement (Tr. 280-81, see Tr. 108-09). And there is support for the proposition that the Government can introduce evidence that a witness at trial has previously identified a defendant, for the witness is available for cross-examination. See generally cases cited in Annot., *Extra-Judicial Identification*, 71A.L.R.2d 499, 482 n.10 (1960); *Baber* v. *United States*, 116 U.S. App. D.C. 358, 324 F.2d 390, *cert. denied*, 376 U.S. 972 (1963).

II. Appellant's right to the assistance of counsel was not infringed.

(Tr. 28-34, 40-42, 44, 47-48, 53-54, 57-58, 63-66, 71-73, 82-87, 89, 91-92, 94-95, 112-13, 116-17, 130-31)

At trial, the four victims of the assaults and robberies charged in the indictment identified appellant as the perpetrator of these crimes (Tr. 53-54, 91-92, 112-13, 130-31). Three of these witnesses had been given the opportunity to observe appellant prior to trial, in April, 1965, in the cellblock of the United States Courthouse, and had recognized him then as their attacker. No conversation of any kind was had with appellant at this time. (Tr. 57-58, 64-65, 71-73, 94-95, 116-17.) After the jury was sworn, appellant moved to dismiss the indictment, asserting that his right to the assistance of counsel was infringed when he was shown to his victims after indictment and in the absence of his lawyer (Tr. 28-32). After argument, this motion was denied, as was a subsidiary motion to exclude the testimony of these witnesses (Tr. 28-34; see Tr. 63-66).[5] Appellee urges this Court to reject this renewed contention as promptly as did the trial judge.

Appellee is aware of no case (nor does appellant cite any) that extends either *Escobedo* v. *Illinois*, 378 U.S. 478 (1964) or *Massiah* v. *United States*, 377 U.S. 201 (1964) to a situation not involving a confession or admission by the accused. The import of these decisions is to ensure that the fifth amendment right to silence is protected. To this end, statements made by an accused at a time when his right to counsel has attached are excluded from evidence if made in the absence of counsel. Obviously these cases have no application to the case at bar, for absolutely nothing was said to or by appellant during the observations in the cellblock (Tr. 33-34, 64-

[5] Appellant also complained that a fourth witness, Mr. Redman, had been taken to see him in the cellblock on the day before the trial commenced (Tr. 30). Neither in the cellblock nor at trial could Mr. Redman identify appellant (Tr. 41-42, 44, 47-48).

65). See *Williams* v. *United States*, 120 U.S. App. D.C. 244, 345 F.2d 733 (1965).

As appellant concedes, "the Constitution confers no right on an accused to be immune from the eyes of his accusers." *Kennedy* v. *United States*, —— U.S. App. D.C. ——, 353 F.2d 462, 466 (1965). *Accord*, *Holt* v. *United States*, 218 U.S. 245 (1910); *Smith* v. *United States*, 88 U.S. App. D.C. 80, 187 F.2d 192 (1950), *cert. denied*, 341 U.S. 927 (1951); *McFarland* v. *United States*, 80 U.S. App. D.C. 196, 150 F.2d 593 (1945); *cert. denied*, 326 U.S. 788 (1946); *Caldwell* v. *United States*, 338 F.2d 385, 389 (8th Cir. 1964); 8 WIGMORE, EVIDENCE, § 2265 (McNaughton rev. 1961). Nor has any court yet questioned the propriety of permitting witnesses to view a defendant prior to trial. Indeed, appellant cannot reasonably object to this procedure. Surely in a case founded upon eyewitness identification the appellant would not suggest that the Government should proceed to trial ignorant of whether its witnesses will identify the defendant in person. In *Kennedy* v. *United States*, *supra* at 463 n. 3, this Court implicitly approved the practice adopted in this case when it said that the identification by the victims "could have been accomplished . . . by a visit to the cellblock or at a police lineup, after a preliminary hearing all without Appellant's consent." See also *Copeland* v. *United States*, 120 U.S. App. D.C. 5, 8, 343 F.2d 287, 290 (1964).* Finally, in a series of cases arising in the Eastern District of Pennsylvania, certain defendants challenged the lineup procedure, but all conceded that they could have lawfully been observed while in their cells. *Morris* v. *Crumlish*, 239 F.Supp. 498 (1965); *Butler* v. *Crumlish*, 229 F.Supp. 565 (1964); see *United States* v. *Evans*, 239 F.Supp. 554 (1965).

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* No case has held that a person under detention may not be observed by police officers. . . . It would be ritualistic formalism to say that an arrested person may be viewed in a cell by officers but that he may not be placed in a line-up for the same purpose.

Had counsel been present in the cellblock, he could not in any way have affected the conduct of the proceedings. Despite the suggestion on page 31 of appellant's brief, counsel could *not* have "insisted" that appellant be viewed in a lineup rather than singly. *Kennedy* v. *United States*, *supra* at 466; *United States ex rel. Stovall* v. *Denno*, 355 F.2d 732 (sic) (2d Cir. 1966) (*en banc*). Nor would counsel necessarily have garnered material for cross-examination, for the witnesses might have reserved their comments on the appearance of appellant for a later and private conference with the prosecutor. Since neither the constitution nor any statute or rule requires that a lineup be conducted or that the defense have pre-trial access to the Government's evidence, the *ex parte* viewing of appellant could not amount to a deprivation of the constitutional right to counsel.[7]

III. The testimony of the victims of these crimes was properly received in evidence.

(Tr. 43-45, 47-48, 67-76, 81, 87-89, 95-102, 104-06, 118-24, 126-27, 133-141, 146-49, 206-08, 480-84, 492, 495-96)

Appellant next contends that the cellblock identification procedure was so unfair that the court should have excluded the testimony of the witnesses who viewed appellant there. This argument is not well-founded. As noted above, "an accused has no right to be viewed in a lineup rather than singly." *Kennedy* v. *United States*, *supra* at 466. The method of identification, inside or outside the courtroom, goes to the weight to be attributed to the testimony of identity and not to its admissibility or constitutionality. *United States ex rel. Stovall* v. *Denno*, *supra*; *People* v. *Partram*, 60 Cal.2d 378, 384 F.2d 1001 (1963), *cert. denied*, 377 U.S. 945 (1964); *People* v.

[7] In passing, appellee notes that appellant was not totally unrepresented at the cellblock viewings. Appellant himself certainly could relate to his counsel any audible comments made by the witnesses and could describe their facial expressions and gestures, if any.

Clark, 28 Ill.2d 423, 192 N.E.2d 851 (1963); *People* v. *Boney*, 28 Ill.2d 505, 192 N.E.2d 920 (1963); *State* v. *Hill*, 193 Kan. 512, 394 P.2d 106 (1964), *Redmon* v. *Commonwealth*, 321 S.W.2d 397 (Ky. 1959); *Commonwealth* v. *Downer*, 159 Pa. Super. 626, 49 A.2d 516 (1946).

Despite appellant's suggestion that he would not have been available for viewing outside a lineup had he been able to post bond (Br. 37-38), it is evident that the Government's witnesses would have seen him in Assignment Court on the days when the case was called for trial.[8] And of course the witnesses could have been taken to appellant's home or place of employment (if he had found a job) to observe him as he came and went. See *Morris* v. *Crumlish*, *supra*.

Appellant's trial counsel examined at length the circumstances of the identifications of appellant by each Government witness (Tr. 67-76, 81, 95-102, 104-06, 118-24, 126-27; see 43-45, 47-48, 87-89, 133-41, 146-49), and argued the matter at length to the jury (Tr. 480-84, 492, 495-96). The jury was properly permitted to weigh the testimony of the witnesses and to believe any or all of them.

IV. The irrelevant testimony of a victim of an unrelated robbery was properly excluded.

(Tr. 382-85, 380, 385-89, 390-93, 397)

In addition to his defense of alibi, appellant proffered the testimony of one Charles Warren Brown, victim of a robbery on November 29, 1965, two months before the crimes alleged in the indictment. In a hearing outside the presence of the jury, Mr. Brown testified that appel-

[8] In a similar setting Mr. Darby observed appellant during proceedings before the United States Commissioner on another case (Tr. 133, 206-08). Appellant does not (nor could he persuasively) challenge the propriety of this arrangement. Mr. Darby's testimony alone would have been sufficient to convict. *Jones (Robert S.)* v. *United States*, D.C. Cir. No. 19541, decided April 28, 1966; *Thompson* v. *United States*, 88 U.S. App. D.C. 235, 188 F.2d 652 (1951).

lant was the person who had robbed him (Tr. 382-85). Appellant then proved that he had been in Occoquan on November 29, serving a sentence of 30 days' imprisonment for intoxication (Tr. 385-89). Appellant was never charged with the robbery of Mr. Brown (Tr. 390-93). The trial court excluded this testimony as "not relevant" to the issues in the case (Tr. 380, 392, 397). The correctness of this ruling is patent. That Mr. Brown was in error is not probative of whether the four victims in the instant case had sufficient opportunity to observe the person who robbed and assaulted them or of the accuracy of their observations and consequent identifications. Appellee will not belabor the point.[9]

CONCLUSION

WHEREFORE, appellee respectfully submits that the judgment of the District Court should be affirmed.

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
DONALD S. SMITH,
CAROL GARFIEL,
Assistant United States Attorneys.

[9] Appellee does note, however, that not one but four witnesses identified appellant in this case, that they observed him for a few minutes in a lighted bus, and accordingly that any conceivable error in the admission or exclusion of evidence would certainly be harmless.

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,846
(Crim. No. 246-65)

MALCUS T. CLEMONS, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

APPELLEE'S SUPPLEMENTAL MEMORANDUM

Introductory Statement:

This memorandum is submitted dependent upon leave of court and deals with the issue reheardbefore the original division of the Court, i.e., the effect of the Supreme Court's Wade-Gilbert-Stovall rulings on the instant case. While latitude and length of argument allowed at the re-hearing seem to make unnecessary a reiteration of the legal points forwarded by appellee at the oral argument, it may be well to provide the Court with citations to the record facts which appellee believes pertinent.

Citations to cases mentioned by appellee at oral argument are set out in an appendix to this memorandum.

COUNTERSTATEMENT OF PERTINENT FACTS

The circumstances surrounding (a) the photo viewing, (b) the viewing at an unrelated United States Commissioner's hearing, and (c) the cell block identification, were widely explored at trial. Actually, the only pre-trial identification to which an objection of exclusion was raised

was the cell block identification (see Tr. 28-34, 220)[1]. As to the cell block identification, counsel agreed (Tr. 28-34) and stipulated as to the surrounding circumstances (Tr. 63-66, 239). While the cell block identification was the basis of the only legal objection raised at trial, the circumstances surrounding the viewing at the United States Commissioner's and the viewing of the photos on the night of the crime were also widely explored at trial[2] and were strongly argued to the jury as affecting the weight to be accorded the identification of appellant as one of the robbers (Tr. 480-81, 484-86, 492; Tr. 460, 463, 466-68, 498-99, 503).

(a) Circumstances Surrounding the Photograph Viewing

The subject of the photograph viewing on the night of the crime was first broached by defense counsel (Tr. 43-44, 75) and the record furnishes the following details of what transpired in that vein. Immediately after the robbery, the bus driver drove the bus and passengers to the Ninth Precinct (Tr. 132). The witness Raniecky gave the police at the precinct

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1 / The objection was on the basis of right to counsel (Tr. 31-A). Defense counsel moved to have the indictment dismissed on this basis or to strike the witnesses (Tr. 28-34, 200).

2 / In addition to pages cited infra, see also, e.g., Tr. 100, 105, 121, 181-82, 184-85.

a description of appellant and was then taken on a tour of the area looking for the robbers (Tr. 74-75). When he returned to the bus, robbery squad detectives had arrived (Tr. 75) and from the victims the detectives obtained a description of appellant (Tr. 99, 172, 178-79, 194, 196).

Within ten to twenty minutes after the robbery, pictures were shown to three of the six witnesses (Tr. 75, 77, 88-89, 99, 101, 155-56, 158). The Robbery Squad detective who responded to the precinct happened to have five pictures with him (154-56)[3/] and all five pictures were shown first to the witness Mr. Raniecky (Tr. 157, 182-83) who was asked if anyone in these five pictures resembled the man that held him up (Tr. 183, 200). Only five pictures were exhibited to the witness because that is all the detective happened to have with him; and although these particular pictures were in the detective's possession because the pictures of current robbery suspects were normally carried, Mr. Raniecky was not told this (Tr. 182-83). From the five pictures Mr. Raniecky picked that of appellant; Raniecky's identification was positive (Tr. 78, 157, 172, 183). The officers at the station did not suggest to Raniecky who might have

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3/ Government Exhibit Nos. 4, 5, 6, 7 and 8 (part of the record on appeal). Government counsel originally had no intention of introducing the pictures but did so because of defense counsel's tack, Tr. 167; the pictures were received in evidence after defense counsel stated he had no objection, Tr. 160 .

committed the crime (Tr. 75). On the bus at the time of the robbery, Raniecky had looked appellant directly in the face from a distance of about six feet for about a minute before appellant pulled the gun (Tr. 55-56, 78-79). He also testified: "I got a good look at him, so I identified him" (Tr. 72).

After Mr. Raniecky selected the picture of appellant from among the five, the detective began to pass the pictures around with the intention of passing all five of them to the other witnesses; however, two of the witnesses identified the picture of appellant, the first one shown to them, so the detective did not show them the other four (Tr. 184, 172-73, 105, 106, 124-25, 126, 185). When the detective showed the pictures to the witnesses they were separated from each other (Tr. 198, 199). The two persons, other than Raniecky, to whom appellant's picture was displayed identified him as one of the robbers (Tr. 99, 103, 120-21, 125).[4] At trial, one of these latter witnesses, Mr. Wilson, was asked about the possibility of having identified appellant because only appellant's picture was shown to him (Tr. 126-27):

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4 / Mr. Darby, the bus driver, did not pick out any pictures on the night of the robbery, preferring to see the subject in person (136-37, 195-96). The witnesses Redman and Franklin testified they were not shown the pictures (Tr. 43-44, 88-89; see Tr. 199).

Redman's uncertainty as to identification at trial is discussed infra; Franklin testified appellant looked like the robber but he could not be certain (Tr. 85, 87).

> Now, is it possible that the very repetition of being always placed [faced:] with the one picture and the one man, might have fixed in your mind, "This is the individual." (Tr. 127)

Wilson answered:

> No, I remembered the face, appearance. (Tr. 127)

All of the Government witnesses who had identified appellant by his picture on the night of the crime identified appellant in the courtroom (Tr. 53, 92, 112). Moreover, the witnesses who positively identified appellant were tenacious in their identification (e.g. Tr. 72, 75-76, 101, 124).

(b) Circumstances Surrounding the Viewing at the Unrelated Commissioner's Hearing

One witness, Mr. Darby (the bus driver), saw appellant at an unrelated hearing before the United States Commissioner on February 11, 1965, several weeks after the crime (Tr. 132-33, 205). (Darby had preferred to identify appellant in person rather than by photograph, see supra note 4.) On February 11th, when the witness arrived at the Commissioner's, appellant was not yet in the hearing room (Tr. 214-15). A detective, who met Mr. Darby at the Commissioner's but did not sit with him, told Darby to sit in the room and observe everyone that came in and out of the hearing room in front of the Commissioner (Tr. 205-206). There were a number of people coming in and out of the room that morning and it was a normal business day. A number of spectators were seated in the room and the officer recalled that criminal cases other than appellant's were heard that morning. (Tr. 206-07, 217.) To the best of the detective's recollection,

appellant's name was not even called out audibly in connection with his case (Tr. 215). After the hearing, the bus driver positively identified appellant as the man who had robbed him (Tr. 133, 146, 207).[5]

Mr. Darby, upon whose mind appellant's face was impressed on the night of the crime,[6] positively identified appellant in the courtroom (Tr. 130-31, 132, 146).

(c) Circumstances Surrounding the Cell Block Viewing

In April 1965, three witnesses went to the cell block in the basement of the United States Courthouse with a detective and the prosecuting attorney. Appellant was brought to the screen and the prosecutor asked if appellant was the same man. (Tr. 57, 70-71, 79, 94-95, 99-100, 116-17.) Appellant was identified as the robber by the men who viewed him (Tr. 58, 79, 94-95, 117, 121-22). The day before the trial began, another witness was taken to the cell block by the prosecutor (Tr. 44). He also viewed appellant, but this witness (who also testified he had not looked at the

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5 / At one point, the following exchange between defense counsel and the detective occurred:

> Q. *** Mr. Darby ... told you that was Mr. Clemons, that was the man who he thought had committed the offense?
>
> A. Yes. He didn't think. He said positively that was the man. (Tr. 216.)

6 / Q. And this was the only impression that you got of this defendant?

A. What do you mean, sir?

Q. I mean a glimpse that you could keep in mind of this person.

A. No, sir, not a glimpse. I looked him straight in the eye when he told me to get it out of there fast or he would put a bullet in my head. (Tr. 148.)

See also Tr. 132, 143, 146-47.

robbers' faces, Tr. 41, 45), said he did not know for sure whether appellant was the man (Tr. 47-48). He was also not sure at trial (Tr. 41-42). At trial, counsel agreed and stipulated: that appellant was represented by counsel on the dates of both viewings; that counsel was not present on either occasion; and that nothing was said or done on appellant's part beyond the viewing (Tr. 29-34, 64-66, 238-39).

DISCUSSION

As previously noted, in view of the latitude allowed to counsel to present appellee's points at the tape-recorded oral argument, appellee would only usurp the Court's time by repeating its legal points here. However, appellee does wish to offer an additional point in connection with a question raised by a member of the panel, i.e., whether the singular viewing in custody and in the absence of counsel was "shocking" and requires relief. At oral argument, appellee noted that many previous cases of singular, in-custody viewing had failed to "shock" the court, e.g., the Kennedy and Wise cases (cited in the appendix), and indeed this very case when it was originally heard and the judgment affirmed. Also pertinent, by way of analogy, is Smith v. United States, 117 U.S. App. D.C. 1, 324 F.2d 879 (1963) (D.C. Cir. No. 17466), rehearing en banc denied November 18, 1963, cert. denied, 377 U.S. 654 (1964).

In the Smith case, appellant complained that while in custody awaiting trial his palm prints were taken in the same cell block where appellant Clemons was viewed in the instant case. Smith urged that there was no right to so transfer him and use him as a basis for evidence. 7/

7/ Brief for Appellant in D.C. Cir. No. 17466, "Questions Presented", pages 7-8, 14-16.

The argument was answered by the Government [8] and the admissibility of the palm prints was sustained in an opinion written by Judge Burger. 117 U.S. App. D.C. at 4, 324 F.2d at 882. No member of the Court registered a view that indicating shock over a situation comparable to that involved in the instant case. [9]

Finally, this Court's recent decision in Borum v. United States, D.C. Cir. No. 20270 (opinion dated December 21, 1967), is also instructive. In that case the defendant, held in custody, was viewed in a line-up without the presence of his attorney, who had asked to be present. Noting prior cases in the area (n.12) and rejecting the argument for reversal, the Court apparently found nothing so shocking as to require upsetting the judgment, either under a constitutional aegis or a supervisory power.

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8 / Brief for Appellee in D.C. Cir. No. 17466, p. 24, n.11.

9 / Cf., also Schmerber v. California, 384 U.S. 757 (1966).

CONCLUSION

WHEREFORE, for these reasons and those tendered at oral rehearing, appellee respectfully submits that the judgment of the District Court should be affirmed.[10/]

/s/ DAVID G. BRESS
DAVID G. BRESS
United States Attorney

/s/ FRANK Q. NEBEKER
FRANK Q. NEBEKER
Assistant United States Attorney

/s/ JAMES A. STRAZZELLA
JAMES A. STRAZZELLA
Assistant United States Attorney

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum has been mailed to attorneys for appellant, William H. Greenhalgh, Esq. and Foy R. Devine, Esq., 424 Fifth Street, N.W., Washington, D.C. 20001, this 29th day of December, 1967.

/s/ JAMES A. STRAZZELLA
JAMES A. STRAZZELLA
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10/ Appellant's Supplemental Memorandum (p. 20) assumed reversal would be the proper remedy. Since the defense first interjected the extra-judicial identifications (Tr. 43, 47, 73), a right-to-counsel deprivation would normally trigger a freedom-from-taint hearing. United States v. Wade, 388 U.S. 218 (1967). However, if the Court were to accept appellee's position (advanced at oral argument) that a "due process" test would look to the totality of the trial, not just the identification, and the Court nevertheless finds a "due process" violation, it would seem that reversal would be the proper remedy. If, however, a "due process" test looking to the surroundings of the identification, and divorced entirely from the trial, were to be formulated, and if the Court found such a "due process" violation, then a Wade-type hearing would seem more appropriate.

APPENDIX

Table of Cases Cited By Appellee At Oral Rehearing

Copeland v. United States, 120 U.S. App. D.C. 5, 343 F.2d 287 (1964)

Gilbert v. California, 388 U.S. 263 (1967)

Kennedy v. United States, 122 U.S. App. D.C. 291, 353 F.2d 462 (1965)

Lewis v. United States, ___ U.S. App. D.C. ___, 382 F.2d 817 (1967)

Stovall v. Denno, 388 U.S. 293 (1967)

United States v. Wade, 388 U.S. 218 (1967)

United States ex rel. Stovall v. Denno, 355 F.2d 371 (2d Cir. en banc 1966)

Wise v. United States, ___ U.S. App. D.C. ___, 383 F.2d 206 (1967)

In The
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MALCUS T. CLEMONS,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

No. 19,946

SUPPLEMENT TO PETITION FOR REHEARING EN BANC

I

This Court, on October 18, 1966, ordered that the Petition for Rehearing En Banc in this case be held in abeyance pending decision by the Supreme Court of the United States in Stovall v. Denno, Supreme Court No. 254, October Term, 1966. The Supreme Court decided Stovall v. Denno on June 12, 1967, along with two other cases, United States v. Wade, No. 334, and Gilbert v. California, No. 223.

In Wade and Gilbert, the Court held that constitutional error existed when a witness identified the defendant in a criminal trial after having been permitted to make a prior identification in a "lineup" at which counsel for the defendant was not present, unless the Government could show by clear and convincing evidence that the later in-court identification was based upon observations of the suspect other than

the lineup identification. This holding was based upon the constitutional right to counsel and the rule thus announced is to be applied wholly without regard to the fairness or unfairness of the pretrial "lineup."

In Stovall, the Court addressed itself to the question of whether this rule should be applied prospectively only or should be applied to convictions which had taken place prior to the date of the announcement of the rule of Wade and Gilbert. In addressing itself to this question, the Court noted that it had applied its holdings as to the right of counsel at arraignment (Hamilton v. Alabama, 368 U.S. 52) at the trial itself (Gideon v. Wainwright, 372 U.S. 335) and on appeal (Douglas v. California, 372 U.S. 353) to prior convictions. With respect to the right to counsel at a pretrial "lineup," however, the Court said that "unlike cases in which counsel is absent at trial or on appeal, it may confidently be assumed that confrontations for identification can be and often have been conducted in the absence of counsel with scrupulous fairness and without prejudice to the accused at trial." Therefore, it concluded, it would not apply the rule of the Wade and Gilbert cases retroactively; i.e., it would not automatically reverse convictions prior to June 12, 1967, in which witnesses identified

the accused after viewing him at a lineup at which counsel was not present. It thus excluded from the Wade and Gilbert rules not only cases in which convictions had become final, but also cases at various stages of trial and direct review.

The Court did not, however, stop there. It proceeded in Stovall to address itself to the question of whether the petitioner was "entitled to relief on his claim that in any event the confrontation conducted in [his] case was so unnecessarily suggestive and conducive to irreparable mistaken identification that he was denied due process of law." This, it said, was a recognized ground of attack upon a conviction independent of any right-to-counsel claim, citing the recent decision of the Fourth Circuit in Palmer v. Peyton, 359 F.2d 199 (1966). After examining the facts and circumstances of the case, including the absolute necessity of an in-hospital identification by a witness in immediate danger of death, the Court concluded that the procedure was not so unfair as to require release of the petitioner on habeas corpus.

These three opinions clearly indicate the disposition which this Court should make of the present case. Appellant's trial took place before June 12, 1967. It follows that any claim that petitioner's conviction should be reversed, without regard to the fairness of his pretrial identification,

because counsel was not present at that identification cannot be sustained. It is equally clear, however, that under Stovall v. Denno, appellant's conviction must be reversed if the viewing of the defendant, prior to trial, by the Government's witnesses, in the absence of counsel, was "unnecessarily suggestive and conducive to irreparable mistaken identification." Certainly appellant is entitled to have his claim in that regard argued and decided on its merits. This is particularly true here because, unlike Stovall and Palmer v. Peyton, supra, the question is presented directly on appeal and not in a collateral attack, on constitutional grounds, against the judgment of a sovereign state. The facts are undisputed. The Government's case in chief against the defendant consisted solely of his identification by a series of witnesses who were present at a robbery. After his indictment, appellant--who was unable to raise bail--was twice brought to the courthouse for trial. On both occasions the trial was postponed. And on both occasions, the United States Attorney, without notice to counsel, took his witnesses down to the cellblock and had them identify the appellant, in the United States Attorney's words, "through the bars." (Tr. 33) Upon being apprised of these facts, appellant's counsel moved to dismiss the

indictment and, when this was denied, to exclude the testimony of the witnesses involved. The court peremptorily denied the motion. (Tr. 44)

On appeal, both the denial of the right to counsel and the unfairness of the pretrial identification were argued. The Government did not, however, address itself to the question of whether the pretrial cellblock identification was "unnecessarily suggestive and conducive to irreparable mistaken identification." Its position, simply, was that the accused had "no right to be viewed in a lineup rather than singly" and any question of fairness was solely for the jury. The Government's argument on the question was as follows:

> "Appellant next contends that the cellblock identification procedure was so unfair that the court should have excluded the testimony of the witnesses who viewed appellant there. This argument is not well-founded. As noted above, 'an accused has no right to be viewed in a lineup rather than singly.' Kennedy v. United States, supra at 466. The method of identification, inside or outside the courtroom, goes to the weight to be attributed to the testimony of identity and not to its admissibility or constitutionality. United States ex rel. Stovall v. Denno, supra; People v. Partram, 60 Cal.2d 378, 384 P.2d 1001 (1963), cert. denied, 377 U.S. 945 (1964); People v. Clark, 28 Ill.2d 423, 192 N.E.2d 851 (1963); People v. Boney, 28 Ill.2d 505, 192 N.E.2d 920 (1963); State v. Hill, 193 Kan. 512, 394 P.2d 106 (1964), Redmon v. Commonwealth, 321 S.W.2d 397 (Ky. 1959); Commonwealth v. Downer, 159 Pa. Super. 626, 49 A.2d 516 (1946).
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> * * * *

> "Appellant's trial counsel examined at length the circumstances of the identifications of appellant by each Government witness (Tr. 67-76, 81, 95-102, 104-06, 118-24, 126-27; see 43-45, 47-48, 87-89, 133-41, 146-49), and argued the matter at length to the jury (Tr. 480-84, 492, 495-96). The jury was properly permitted to weigh the testimony of the witnesses and to believe any or all of them." (PP. 11-12 of Brief for Appellee)

We do not know what this Court decided. It affirmed without opinion. If this affirmance was based on the view advanced by the Government, it clearly was in error. The Supreme Court in Stovall has made it clear that it is open on habeas corpus to contend that a pretrial confrontation was so unfair and suggestive as to make his conviction on the basis of the witnesses' subsequent testimony at the trial unconstitutional. Certainly it is clear, therefore, that on direct appeal, where the reviewing court's powers are much wider, the court must consider whether the pretrial identification was sufficiently unfair as to warrant reversal of a conviction based only on identification testimony by the witnesses who were afforded the pretrial viewing.

At the time this case was argued, however, it was not at all clear that such a claim was a proper one. The Supreme Court in Stovall v. Denno said that "this is a recognized ground of attack upon a conviction independent of any right to counsel claim." It cited for that proposition,

however, only Palmer v. Peyton, 359 F.2d 199 (4th Cir. 1966), which was decided only shortly prior to this case, and the only decision in this Circuit, Kennedy v. United States, ____U.S. App. D.C.____, 353 F.2d 462, had said that "appellant has no right to be viewed in a lineup rather than singly." It is therefore reasonable to assume that this Court's affirmance was based on the now clearly erroneous ground that the fairness of the pretrail identification procedure was immaterial.

It may be, however, that the panel which decided this case rejected the Government's contention but affirmed without opinion nevertheless because it felt that it was crystal clear that the pretrial identification procedure utilized here was not unfair or prejudicial. If so, the decision clearly must be reconsidered. We will not restate here the circumstances under which the pretrial identification took place. They are set forth in full detail on pages 4-6 of the Brief for Appellant and are summarized on pages 2-3 of the Petition for Rehearing. We can conceive of no way in which it can be sensibly argued that the viewing procedure to which appellant was subjected was not "unnecessarily suggestive and conducive to irreparable mistaken identification." As the Supreme Court said in Stovall: "The practice

of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned." How much more subject to condemnation is the practice of conducting this single showing of a suspect in a cellblock with all of the suggestion of criminality thereby communicated. In Stovall, the Court did affirm the denial of the writ of habeas corpus. There, however, the showing was in a hospital room and the circumstances made such a viewing imperative. Those circumstances are fully set forth in the opinion of the Supreme Court and were expressly relied upon by the Court as justifying the result it reached. Here, to the contrary, there was no circumstance at all which indicated the necessity, or even the desirability from the viewpoint of justice, of the procedure used.

II

There is a second, and distinct, reason why the petition for rehearing herein should be granted even if a majority of the court en banc favors affirmance.

This case was argued on June 13, 1966, and decided, without opinion, on July 19, 1966. A petition for rehearing was filed because, as the petition pointed out, the absence of an opinion setting forth the nature of the case and the reason for affirmance virtually precluded, as a practical

matter, the filing of a successful petition for certiorari. This Court first denied the petition, and then sua sponte vacated the denial and held the petition in abeyance pending the decision of the Supreme Court in Stovall v. Denno.

No one can, of course, predict what would have happened if the panel which heard this case had written an opinion in July, 1966, setting forth and ruling against the appellant's contentions. But there is at least a substantial possibility that, if that had occurred, a petition for certiorari would have been granted and this case would have been argued and decided with Wade, Gilbert and Stovall.

This is, in fact, what happened in the Wade case. Certiorari was granted in Gilbert on June 13, 1966, 384 U.S. 985 and in Stovall on June 20, 1966, 384 U.S. 1000. The petition for certiorari in Wade was not granted, however, until October 10, 1966 (385 U.S. 811) and the case was then set for argument with Gilbert and Stovall. All three were argued together on February 16, 1967 and Wade is a free man. There clearly would have been ample time for this case also to have been heard along with Gilbert and Stovall if this Court had explicitly decided the issue in July, 1966, and a petition for certiorari had been filed. And, if this had happened, appellant's conviction, like Wade's, would have been reversed

on the right to counsel ground.

That is, however, presumably water over the dam. It does serve, however, to point up the possibility that unless rehearing is now granted, the absence of an opinion may again deprive petitioner of any meaningful opportunity for further review of an adverse decision. Appellant, his counsel and the Supreme Court of the United States, if a petition for certiorari is filed, are in all fairness entitled to some statement of the grounds for this Court's decision, even if that decision is to affirm.

We do not contend that an appellant is entitled to an opinion in every case, or that this Court's new Rule 24(c), providing (retroactively in this case) for dispositions without opinion is improper. We do contend that this case is not one to which that rule should be applied.

Rule 24(c) says that the court may dispense with opinions "where the issues occasion no need therefore." We assume that this means "where the issues are not sufficiently serious to warrant the time and effort required to write an opinion." Certainly that standard was misapplied as to one issue here--the right to counsel at a pretrial confrontation. That issue was serious enough to warrant a grant of certiorari and a reversal by the Supreme Court in Wade and Gilbert.

We think, with all deference, that this shows that it was serious enough to warrant an opinion in this case. But that, as stated, is water over the dam.

There also was a second issue which the panel which heard this case did not appear to consider serious enough to warrant an opinion: whether, in the words of appellant's brief of May 2, 1966, the nature of the pretrial inspection of the appellant by the Government's identifying witnesses "was such as to poison any later identification in the court-room." (Brief for Appellant, p. 34) The Supreme Court has now made it clear that the Government's response to that issue was erroneous as a matter of law. In the words of the Supreme Court in Stovall, a conviction may be reversed (and, indeed, habeas corpus should be granted) if "in the totality of the circumstances surrounding it" the pretrial confronta-tion "was so unnecessarily suggestive and conducive to irreparable mistaken identification that [appellant] was denied due process of law." This issue is not water over the dam. And it surely is a substantial enough issue to warrant an opinion setting forth the reason why it was decided adversely to appellant. Unless such an opinion is written it is impossible to determine whether this Court accepted the Government's sole contention with respect to it

--that the effect of the pretrial confrontation was solely a matter for the jury--or whether the Court, rejecting the Government's view, nevertheless found on the facts that there was insufficient prejudice under all the circumstances to warrant reversal.

We assume that the first hypothesis is correct, i.e., that the panel which heard this case accepted the Government's argument. It is hard to believe that this Court would reject the Government's contentions and affirm nevertheless on a ground not argued by the Government without considering the issues serious enoughtto warrant an opinion. But we do not know and the Supreme Court cannot know. And the difference between the two possible bases for decision is obviously critical to any possibility of further review. The only way in which this defect can be remedied is by granting the petition for rehearing and, if a majority of the Court so decides, affirming with an opinion setting forth the basis upon which the decision is reached.

CONCLUSION

For all of these reasons, we submit that the Petition for Rehearing En Banc should be granted and that, on

--that the effect of the ... ation was solely a matter for the ... the ... rejecting the Government's view, nevertheless found ... facts that there was insufficient ... under all the circumstances to warrant reversal.

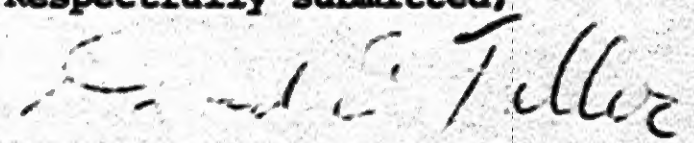
We assume that the first hypothesis is correct, i.e., that the panel which heard ... accepted the Government's argument. It is hard to believe that this Court would reject the Government's contention ... affirm nevertheless on a ground not argued by the Government without considering the issues serious enough to warrant an opinion. But we do not know and the Supreme Court cannot know. And the difference between the two possible bases for decision is obviously critical to any possibility of further review. The only way in which this defect can be remedied is by granting the petition for rehearing and, if a majority of the Court so decides, affirming with an opinion setting forth the basis upon which the decision is reached.

CONCLUSION

For all of these reasons, we submit that the Petition for Rehearing in Banc should be granted and that, on

rehearing, the judgment below should be reversed.

Respectfully submitted,



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